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The Selected Legal Aspects of Foreign Investment in Australia

Master's Thesis

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Poděkování

Na tomto místě bych chtěla předně poděkovat doc. JUDr. Vladimíru Balašovi, CSc., za odborné vedení, cenné rady a připomínky při psaní diplomové práce. Dále chci poděkovat své rodině za maximální podporu a oporu během mých studií.

Prohlášení:

Prohlašuji, že předloženou diplomovou práci jsem vypracovala samostatně a že všechny použité zdroje byly řádně uvedeny. Dále prohlašuji, že tato práce nebyla využita k získání jiného nebo stejného titulu.

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List of Abbreviations

AANZFTA	Agreement Establishing the Asean-Australia-New Zealand Free Trade Area
AClFTA	Australia – Chile Free Trade Agreement
ANZCERTA	Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement
Art	Article
AUSFTA	Australia-US Free Trade Agreement
AustLII	The Australasian Legal Information Institute
Austrade	The Australian Trade and Investment Commission
BIT	Bilateral Investment Treaty
Ch	Chapter
CHAFTA	Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China
FATA	Foreign Acquisitions and Takeovers Act
FDI	Foreign Direct Investment
FET	Fair Equitable Treatment
FIRB	The Foreign Investment Review Board
FPI	Foreign Portfolio Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	The International Court of Justice
ICSID	The International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement Mechanism
JAEPA	Agreement between Australia and Japan for an Economic Partnership

KAFTA	Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea
MAFTA	Malaysia-Australia Free Trade Agreement
MFN	Most-Favoured-Nation
MIGA	The Multilateral Investment Guarantee Agency
MIT	Multilateral Investment Treaty
NAFTA	North American Free Trade Agreement
OECD	The Organisation for Economic Co-operation and Development
S	Section
SAFTA	Singapore - Australia Free Trade Agreement
TAFTA	Australia-Thailand Free Trade Agreement
TPP	Trans Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Trade Related Aspects of Intellectual Property Rights
WTO	The World Trade Organization

1 Introduction

The global economy is characterized not only by a steady increase of international trade, but also by growing flows of foreign investment. The importance of foreign investment in providing foreign markets with goods and services has become comparable to trade. Foreign investment is a crucial factor for economic and social development, sustained economic growth, poverty reduction, improved infrastructure, and financial stability. There has been an increase of foreign investment all around the world since the mid-1980s. Factors as, globalization, advancement in technology, liberalization of governments' laws and practices all contributed to a rise of cross-border investments.

One of factors which might influence the decision of foreign investor whether to invest in a particular economy is how manageable they view the political risk in a host country. Political risk may, for example, comprise the danger of expropriation of an investment without adequate compensation, or measures which can have an effect equivalent to expropriation. The most important legal instruments in international investment law that may mitigate this kind of risk are bilateral investment treaties ('BITs') and treaties with investments chapters such as free trade agreements ('FTAs'). Since the first BIT, concluded between Germany and Pakistan in 1959, the number of such treaties has risen to more than 2,500 concluded BITs nowadays. Nonetheless, the existence of BIT between particular states does not guarantee that there will be an increase of foreign investment between those two countries in the future. Favourable conditions for foreign investment include a legal framework with reliable protection of property rights, an independent and effective judicial system, legal certainty, and well-defined rules both for governmental interference and for entrepreneurial activities. In legal terms, a favourable investment climate is closely linked to the rule of law and 'good governance'.

Australia is an attractive destination for foreign investment. The country has experienced 24 years of uninterrupted annual growth since 1990-91, an achievement unequalled by any other developed economy. Its strategic location with its proximity to Asia is used by many companies as a 'gateway' for their expansion and investment in Asia-Pacific. Further, Australia benefits from its skilled workforce, strong governance, reliable and predictable law system, good infrastructure and offers a business-friendly environment to investors. There is a government's trade and investment development

agency, the Australian Trade and Investment Commission ('Austrade'), which, among other responsibilities, is responsible for promotion, attraction and facilitation of foreign investment into Australia. Austrade also provides its services for foreign companies to establish and build their business presence in Australia.

Australia has relied on foreign investment and welcomes foreign investment. As stated in the current Australia's Foreign Investment Policy ('Investment Policy'):

'Foreign investment has helped to build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and innovation into the future. Without foreign investment, production, employment and income would all be lower.'[1]

The purpose of this master's thesis is to introduce some legal aspects of foreign investment in Australia and especially those which can be crucial for investors while contemplating about investing in Australia. As Australia is a lucrative destination for foreign investment and has tight-investment relationships with Europe, it can be an interesting destination for investment of Czech companies as well.

The master's thesis is divided into 6 chapters in which it introduces the selected legal aspects of foreign investment in Australia. The second chapter clarifies basic concepts in international investment law. The third chapter familiarizes with legal sources of foreign investment in Australia. The fourth chapter then covers issues of admission and establishment of foreign investment in Australia. Finally, the fifth chapter deals with standards of treatment and other substantive standards accorded to investors in BITs and FTAs entered into by Australia.

The findings in the master's thesis are based on interpretation and analysis of respective legal sources with help of available literature.

[1]Foreign Investment Review Board, Australian Government, *Australia's foreign investment policy* (1 July 2016) <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>.

Please note that this master's thesis follows the Australian Guide to Legal Citation published by the Melbourne University Law Review Association in collaboration with the Melbourne Journal of International Law; the Australian Guide to Legal Citation is available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1586203/FinalOnlinePDF-2012Reprint.pdf.

2 Key definitions

This chapter explains key terms in foreign investment law, the concept of investment and investor. As these terms are a determining factor whether a particular investment and investor fall into the scope of a respective international investment agreement[2]('IIA') and as a result can accord an investor and investment stipulated rights. Firstly, the distinction between the economic definition of investment and legal definition of investment is illustrated. Further, the concept of investor is analysed and the issue of 'treaty shopping' related to this concept is discussed.

2.1 Economic Definition of Investment

In this chapter concepts forming the definition of investment in economic sense, namely foreign direct investment ('FDI') and foreign portfolio investment ('FPI') will be analysed.

2.1.1 Foreign Direct Investment

The economic debate often assumes that a direct investment involves (a) the transfer of funds, (b) a longer-term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk.[3]To satisfy the requirement of foreign investment such a transfer must be from one country to another for the purpose of its use in that country.

The aspect of control in FDI was stressed in the definition on FDI provided by Graham and Krugman, where they defined FDI as follows: 'FDI is formally defined as ownership of assets by foreign residents for purposes of controlling the use of those assets.'[4]

Under international standards, such as those prepared by the Organisation for Economic Co-operation and Development ('OECD'), the definition of foreign

[2]For purposes of this thesis international investment treaties include bilateral investment treaties and then treaties with investment chapters such as free trade agreements.
[3]Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 60.
[4]Edward M. Graham and Paul R Krugman, *Foreign direct investment in the United States* (Washington, D.C.: Institute for International Economics, 2nd ed, 1991) 7.

investment, where the threshold for the minimum equity stake for an investment to qualify as direct investment is recommended, reads as follows:

> Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor.[5] The 'lasting interest' is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise.

The above recommended 10 percent rule threshold is also accepted by the Government of Australia as the determinant distinguishing direct investment from portfolio investment.[6]

2.1.2 Foreign Portfolio Investment

The distinguishing element from FDI is that, in the case of FPI, there is a divorce between management and control of the company and the share of ownership in it.[7]

Unlike FDI, FPI is normally represented by a movement of money for the purpose of buying shares in a company formed or functioning in another country. It could also include other security instruments through which capital is raised for ventures.[8]

In relation to FPI, it is generally accepted that an investor takes upon himself the risk involved in the making of such investment. As opposed to FDI, FPI was not protected by customary international law. Nonetheless, FPI can be protected under IIA. To afford such protection, FPI must be specifically included in the definition of foreign investment in the treaty.[9]

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[5]OECD, *OECD Benchmark, Definition of Foreign Direct Investment, fourth edition 2008*, [11] <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>.
[6]See, eg, Australian Bureau of Statistics, *5370.0.55.001 - Information Paper: Foreign Direct Investment Data Collection: Overcoming Hurdles and Obstacles in FDI Measurement and Collection, Aug 2003* (8 August 2003) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5370.0.55.001>; Department of Foreign Affairs and Trade, Australian Government, *What is foreign investment?* <http://dfat.gov.au/trade/topics/investment/Pages/australia-and-foreign-investment.aspx>.
[7]M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2nd ed, 2004) 7.
[8]Ibid.
[9]Ibid 9.

2.2 Legal definition of investment

As there is no traditional legal understanding of investment, parties to IIAs are free to negotiate and limit the scope of this term. The concept of investment under *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[10] ('ICSID Convention') and under IIAs concluded with Australia will be discussed in this chapter.

2.2.1 Definition of Investment for Purposes of ICSID Convention

ICSID Convention had to refer to investment in order to define the types of disputes that could be settled by the International Centre for Settlement of Investment Disputes ('ICSID') tribunals. Australia as a party to ICSID Convention has included a provision in relation to the possibility of bringing a claim under investor-state arbitration before ICSID in all its BITs with an exemption of *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*[11]and also in all investment chapters of FTAs which contain the investor-state dispute settlement mechanism 'ISDS'.[12]

The term 'investment' appears in art 25 of ICSID Convention, which sets fort the jurisdictional requirements for a dispute before ICSID. Although ICSID Convention uses the term 'investment' it does not provide its definition. It was, however, a deliberate decision not to include the definition of investment in ICSID Convention for fear that a concrete meaning would limit its scope and raise unnecessary jurisdictional problems.[13]

When a claim under IIA is brought before ICSID tribunal, the claimant must demonstrate that the case concerns an investment both within the meaning of a particular IIA and within the meaning of ICSID Convention.[14]The practice of tribunals in relation

[10]opened for signature 18 March 1965, 575 UNTS 160 (entered into force 14 October 1966).
[11]signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993) ('*BIT between Australia and Hong Kong*').
[12]See, eg, *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China,* signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015); *Australia-Thailand Free Trade Agreement,* signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005).
[13] David A Lopina, 'The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s' (1988) 4 *Ohio State Journal on Dispute Resolution* 107, 114.
[14]Kenneth J. Vandevelde, *Bilateral Investment Treaties, History, Policy and Interpretation* (Oxford University Press, 2010) 133.

to interpretation of 'investment' under art 25 of ICSID Convention has been inclined to interpret it autonomously, i.e. independently of the investment clause in the applicable IIAs.[15]

Concerning the definition of investment, many arbitration panels rely on *Salini* test,[16]where the elements consisting investment were set out, namely, a contribution of money or assets, a certain duration, an element of risk and a contribution to the economic development of the host state. The requirement of regularity of profit and return was not mentioned by the *Salini* Tribunal as an element comprising the investment. This fifth condition was established in the case of *Fedax N.V. v. The Republic of Venezuela*[17]which originally defined five criteria for the investment previously provided by Schreuer[18]as criteria which are common to most of investments.

Nonetheless, some panels moved in variety of discretion in relation to *Salini* test.[19] In the case of *Biwater v Tanzania*[20]the tribunal observed the following in relation to application of *Salini* test:

> In the Tribunal's view, there is no basis for a rote, or overly strict, application of the *Salini* criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of 'investment' were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States. Hence the following oft-quoted passage in the Report of the Executive Directors:
>
> 'No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known

[15]See *Salini v Marocco (Jurisdiction)* (2001) 42 ILM 609 [52].
[16]named under the case, *Salini v Marocco (Jurisdiction)* (2001) 42 ILM 609, where these criteria were formulated.
[17]*(Jurisdiction)* (1997) 37 ILM 1380, 1381.
[18]Christoph H Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed, 2009) 126.
[19]See, eg, *Malaysian Historical Salvors v Malaysia (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/10, 17 May 2007) [73]-[74]; *Joy Mining Machinery Limited v. Egypt (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/11, 23 July 2001) [53]; *Quiborax v. Bolivia (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/06/2, 27 September 2012) [220].
[20]*(Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008).

in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (art 25(4)).'[21]

In addition, the Tribunal further noted that: 'a more flexible and pragmatic approach to the meaning of "investment" is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case […].'[22]

2.2.2 Definition of Investment under IIAs

Most multilateral investment treaties ('MITs'), FTAs with investment chapters and BITs include a broad definition of investment. They usually refer to 'every kind of asset' followed by an illustrative and usually non-exhaustive list of covered assets. Rubins refers these types of treaties containing such a definition of investment as 'illustrative list' treaties.[23]Most of these definitions in IIAs cover both direct and portfolio investment. Their approach is to give the term 'investment' a broad definition, recognising that investment forms are constantly evolving.

For example, *Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments*[24]in art 1(a) provides the following definition of investment:

'investment' means every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time including activities associated with investments. Investment includes but is not limited to:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges,

(ii) shares, stocks, bonds and debentures and any other form of participation in a company,

(iii) a loan or other claim to money or a claim to performance having economic value,

[21]*Biwater v Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008) [312].
[22]Ibid [316].
[23]Noah Rubins, 'The Notion of 'Investment' in International Investment Arbitration' in Stefan Michael Kröll and Norbert Horn (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International 2004) 283, 291-2.
[24]signed 30 September 1993, [1994] ATS 18 (entered into force 29 June 1994) ('*BIT between Australia and Czech Republic*').

(iv) intellectual property rights, including industrial property rights such as patents, trademarks, trade names, industrial designs, copyright, know-how and goodwill, and

(v) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to engage in agriculture, forestry, fisheries and animal husbandry, to search for, extract or exploit natural resources and to manufacture, use and sell products;

All BITs[25]and most of investment chapters of FTAs,[26]as for example, *Australia-Thailand Free Trade Agreement*[27]('TAFTA') concluded and in force with Australia, including *Trans Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam*[28]('TPP') that was recently concluded but is not yet in force, contain such a broad definition of investment followed by an illustrative, non-exhaustive list of covered assets.

Nonetheless, there are other IIAs which provide a different approach to defining investment, setting forth a broad but exhaustive list of covered economic activities or containing a negative list of investment. Treaties including such a definition are determined as 'exhaustive list' treaties[29]by Rubins. Such a treaty which also contains a negative list of investment is, for example, *North American Free Trade Agreement*[30] ('NAFTA'). However, these forms of provisions defining investment are not present in any IIAs that Australia is a party to.

Rubins, finally, terms other kind of treaties as 'hybrid list' treaties,[31]which like 'illustrative list' treaties define investment broadly as to 'every asset' and include a non-exhaustive list of forms which such investment may take. In addition, in this type of treaties, investment must meet characteristics of investment such as the commitment of capital, the expectation of gain or profit or the assumption of risk. Some FTAs with Australia contain such a definition of investment as, for example, recently concluded *Free Trade Agreement between the Government of Australia and the Government of the*

[25]For a full list of BITs with Australia refer to Schedule 1 to this thesis.
[26]For a full list of FTAs with Australia refer to Schedule 2 to this thesis.
[27]signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005).
[28]signed 4 February 2016, [2016] ATNIF 2 (not yet in force).
[29]Rubins, above n 23, 292-3.
[30]signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994).
[31]Rubins, above n 23,293-4.

People's Republic of China[32] ('CHAFTA'). Art 9.1(d) of this FTA defining investment, followed by a non-exhaustive list of assets which investment may take, states as follows:

> investment means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk […].[33]

The term 'indirectly' in the above definition indicates, as was mentioned earlier in this thesis, that such a term covers portfolio investment.

In the case of a dispute between an investor and a state, if a claimant's activity falls into a non-exhaustive list of investment examples, in general, there should not be a problem with jurisdiction. However, an issue may arise, when such a claimant's activity is not listed within such examples. In this case, tribunals will normally determine the nature of the activity on a case-by-case basis, giving particular attention to certain attributes that characterize 'classic' investment patterns,[34]such as those established by *Salini* test.

2.3 Definition of Investor

The object of international investment law is to promote and protect the activities of private foreign investors. This does not necessarily exclude the protection of government-controlled entities as long as they act in a commercial rather than in a governmental capacity.[35]

Investors are either individuals (natural persons) or companies (juridical persons). The foreignness of the investment is determined by the investor's nationality.[36]The status of foreign investor is extended in some investment treaties with Australia to permanent residents.[37]The investor's nationality or its permanent residency is a determining factor

[32]signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015).
[33]Ibid.
[34]Rubins, above n 23, 296.
[35]Dolzer and Schreuer, above n 3, 46; *CSOB v Slovakia (Jurisdiction)* (1999) 5 ICSID Rep 335 [16]-[27].
[36]Anthony C. Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20 *ICSID Review* 357.
[37]See, eg, *Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments,* signed 3 May 2001, [2002] ATS 19 (entered into force 5 September 2002); *Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments*, signed 30 September 1993, [1994] ATS 18 (entered into force 29 June 1994); *BIT between Australia and Hong Kong.*

regarding from which treaty he may benefit. Thus, if an investor wishes to rely on a BIT, he must show that he holds the nationality or in some investment treaties permanent residency of one of the two state parties. If an investor wishes to rely on ICSID Convention, he must show that he has the nationality of one of the state parties to ICSID Convention.

2.3.1 Nationality of Natural Person

Nationality of a natural person is determined primarily by the law of the country whose nationality is claimed. Some IIAs contain a provision that nationality of person is established according to law of the other Party.[38]In Australia, citizenship and permanent residency of an individual is regulated under *Australian Citizenship Act 2007* (Cth).

Due to the different nationality laws in existence, it is possible for an individual to have nationality of more than one state or even reside in a state of which he or she has no nationality. This, however, does not allow an individual to rely on protection of both states should he or she be in need of such.[39]The rule under customary international law is that such a person shall be treated as a national of the country of his or her 'dominant and effective' nationality.[40]

ICSID Convention in art 25(2)(a) explicitly excludes dual nationals if one of their nationalities is that of the host state. The tribunal relied on this provision in ICSID Convention in the case of *Champion Trading v Egypt*[41]where three of claimants had dual US and Egyptian nationality and as a result the claim was dismissed.

2.3.2 Nationality of Company

Nationality normally presupposes legal personality. Therefore, unincorporated entities and holdings will not, in general, enjoy legal protection, although a treaty may provide

[38]See, eg, *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments*, signed 17 November 1992, [1993] ATS 19 (entered into force 29 July 1993) art III(6)(b) ('*BIT between Australia and Indonesia*'); *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015) art 1.2(n).
[39]Engela C. Schlemmer, 'Investment, Investor, Nationality, and Shareholders' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2012) 50, 71-2.
[40]Vandevelde, above n 14, 158.
[41]*(Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/9, 21 October 2003).

otherwise.[42]Nationality of corporations is usually more complex than that of natural persons. Generally, three tests exist for ascribing corporate nationality. Nonetheless, some BITs go beyond these three tests and require a genuine economic activity of the company in the host state. Virtually all BITs use one, or some combination, of these three tests.[43]

The most common test for the determination of corporate nationality is the place of incorporation. Under this test, nationality of the company is ascribed under the laws which it is organized. Investor in this case does not need to have any economic link with the home country. Tribunals in such cases, where the sole criterion of incorporation is required to establish nationality of the company, have refused to pierce the corporate veil and to look at nationality of the company's owners.[44]As in the case of *Saluka v Czech Republic*[45]where the respondent objected that Saluka was merely a shell company controlled by its Japanese owners. The Tribunal, nevertheless, ruled in accordance with the incorporation criterion in the BIT. The Tribunal in this regard said the following:

> The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed…It is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.[46]

Similarly, The Tribunal refused to pierce the corporate veil in the case of *Tokios Tokelės v Ukraine.*[47]

The criterion of incorporation is contained in all investment chapters of FTAs that Australia has entered into. For example, *Agreement between Australia and Japan for an Economic Partnership*[48]('JAEPA'), which in its art 14.2(g) defines the term 'investor of a Party' as 'a natural person or an enterprise of a Party, that seeks to make, is making, or has made, an investment in the Area of the other Party.' Art 14.2(b) of JAEPA then provides the definition of an enterprise as follows: 'The term "enterprise of a Party" means an enterprise constituted or organised under the law of a Party.' Likewise, as investment chapters of FTAs, all BITs with Australia contain the criterion of

[42]Dolzer and Schreuer, above n 3, 49.
[43]Vandevelde, above n 14, 159.
[44]Dolzer and Schreuer, above n 3, 50.
[45]*(Partial Award)* (PCA Arbitral Tribunal, 17 March 2006).
[46]Ibid [240].
[47]*(Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/18, 29 April 2004).
[48]signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015).

incorporation as a basis for establishing nationality of the company, although with the more elaborated wording.

The second test ascribing nationality of a company is under the company's seat, also known as the principal place of business. This test requires a stronger link between a company and its state of nationality than the incorporation test. The company must have its headquarters or perhaps its most important production facilities in the territory of that state.[49]Such a test establishing nationality of the company under its seat is not present in any FTAs or BITs.

The third test is the place of ownership control test. This test is most commonly found in combination with the one of the other two test mentioned above, rather than alone.[50] Nationality under this test is based upon nationality of those who own or control the company. The control test can only be determined by lifting the corporate veil.[51]A problem arises what establishes control. Professor Schreuer in his commentary on ICSID Convention notes the following to control:

> the existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. In order to obtain a reliable picture, all these aspects must be looked at in connection. There is no simple mathematical formula based upon shareholding or votes alone.[52]

The criterion of control as a second option for the determination of nationality of a company is laid down in all BITs concluded with Australia in combination with the incorporation test, with the exemption of *Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investment, and Protocol*[53]which does not provide the control test. Under this test a company can be incorporated under the law of a third country, but the company must be owned or controlled by the company incorporated under the law of the

[49]Vandevelde, above n 14, 163.
[50]Ibid 164.
[51]Kenneth J Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41 *Harvard International Law Journal* 469, 476.
[52]Christoph H. Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) 321.
[53]signed 23 August 2005, [2007] ATS 20 (entered into force 21 July 2007) ('*BIT between Australia and Mexico*').

Contracting party or by a national of the other Contracting party. Nonetheless, FTAs with Australia unlike BITs, do not contain the criterion of control for the ascription of nationality and they only stipulate the test of incorporation for the nationality determination.

For example, *Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments*[54]provides the control test in art 1(d) as follows:

> 'company' means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised:
>
> (i) under the law of a Contracting Party, or
>
> (ii) under the law of a third country and is owned or controlled by an entity described in paragraph (1)(d)(i) of this Article or by a natural person who is a national of a Contracting Party under its law, regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

It follows then that protection under BITs is afforded also to companies which are not incorporated under the law of Australian but which are owned or controlled by nationals (both natural and juridical persons) of Australia.

In relation to the control determination under IIAs, most of BITs[55]with Australia provide that such control is established when the person or company has a substantial interest in the company or in the investment. Nonetheless, there is not further determined what establishes the substantial interest.

Some BITs provide more detailed criteria for establishing control. Such as, *Agreement between the Government of Australia and the Government of the Republic of India on the*

[54]signed 15 August 1991, [1992] ATS 19 (entered into force 10 May 1992).

[55]See, eg, *Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments,* signed 15 August 1991, [1992] ATS 19 (entered into force 10 May 1992) art 1(3); *Agreement between the Government of Australia and the Government of* Romania *on the Reciprocal Promotion and Protection of Investments*, signed 21 June 1993, [1994] ATS 10 (entered into force 22 April 1994) art 1(3) ('*BIT between Australia and Romania*'); *Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments*, signed 5 March 1991, [1991] ATS 36 (entered into force 11 September 1991) art 1(3).

Promotion and Protection of Investments[56]in art 1(h), which establishes a qualitative test with combination of a quantitative test of exercising of control and reads as follows:

For the purposes of this Agreement, a company is regarded as being controlled by a company or by a natural person, if that company or natural person has the ability to exercise decisive influence over the management and operation of the first mentioned company, specifically demonstrated by way of:

(i) ownership of 51% of the shares or voting rights of the first mentioned company, or

(ii) the ability to exercise decisive control over the selection of the majority of members of the board of directors of the first mentioned company.

A similar approach in relation to control determination is provided as well in art 1(3) of *Agreement between Australia and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments.*[57]

The stronger link with the state as, for example, in the form of the requirement of a genuine economic activity of the company in order to be ascribed nationality of the state is present in only one IIA concluded with Australia, in *BIT between Australia and Mexico*, where beside the criterion of incorporation, the company must also have substantive business operations in the territory of the Contracting Party to be ascribed nationality of such the Contracting Party.[58]

2.3.2.1 Shareholders as Investors

It has been recognised in international law that shareholders have the right to seek protection of investment independently from the corporation.[59]

Some investments are made through the local company in the host state, the local company as a such cannot bring a claim in relation to breach of state's obligation under

[56]signed 26 February 1999, [2000] ATS 14 (entered into force 4 May 2000) ('*BIT between Australia and India*').
[57]signed 16 June 2005, [2010] ATS 8 (entered into force 29 June 2009) ('*BIT between Australia and Turkey*').
[58]Ibid art 1(c)(ii).
[59]Stanimir A Alexandrov, 'The "Baby-Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis' (2005) 4 *The Law and Practice of International Courts and Tribunals* 19, 27.

the investment treaty, in such the case shareholders can be eligible to pursue protection of its investment under the treaty. Many investment treaties, including all BITs and some investment chapters of FTAs with Australia, cover shareholding or participation in a company in their definitions of investment, thus independent standing of shareholders is then certain.[60]

Therefore, it is not the locally incorporated company that is treated as a foreign investor but the shareholder or the participant in the company and as a such the shareholder or participant can pursue its claim against the host state. The Tribunal dealt with such a matter, for example, in *Azurix Corporation v The Netherland Argentine Republic.*[61]

2.3.2.2 Corporate Restructuring and Treaty Shopping

The above-mentioned criteria for ascertaining of investor's nationality show clearly that investors can easily adjust their corporate structure to avail themselves of protection under IIAs. Investors seeking protection under IIAs sometimes set up a company inside their holding structure in a state that has favourable investment treaty relations with the host State. That company will then be used as a conduit for the investment.[62]

The process of structuring investments so as to take the advantage of protection of a particular BIT has become known as 'treaty shopping'.[63]This practice is not illegal or unethical as such, but states may regard such practices as undesirable.[64]

A practice of tribunals is not to reject claims of investors in cases where the investment restructuring was made before the dispute has arisen, as for example, in the case of *Mobil Corporation and Others v Venezuela*.[65]However, in cases where the dispute has already arisen, tribunals showed their disdain at this practice. As in the case of *Phoenix Action Limited v The Czech Republic*.[66]In this case, assets of two Czech companies had been frozen and seized. Subsequently these two companies were sold to Phoenix Action Ltd

[60]Dolzer and Schreuer, above n 3, 57.
[61]*(Jurisdiction)* (2004) 43 ILM 262.
[62]Dolzer and Schreuer, above n 3, 54.
[63]Vandevelde, above n 14, 162.
[64]Dolzer and Schreuer, above n 3, 54.
[65]*(Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/27, 10 June 2010).
[66]*(Award)* (ICSID Arbitral Tribunal, Case No ARB/06/05, 15 April 2009).

(Phoenix), a company incorporated under the laws of Israel. Phoenix then instituted arbitration under BIT between The Czech Republic and Israel. The Tribunal refused its jurisdiction it this case and made the following observations:

> The unique goal of the "investment" was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system.[67]

Similarly, the Tribunal refused its jurisdiction in the recent case of *Philip Morris Asia Limited v The Commonwealth of Australia*.[68]This case is the first and only investor-state dispute brought against Australia. The dispute was brought by Philip Morris under *BIT between Australia and Hong Kong*, following to the getting into force of new legislation in Australia, *Tobacco Plain Packaging Act 2011* (Cth). Under this law, all tobacco products are required to be sold in plain packages. Philip Morris claimed that this law extinguished its intellectual property rights, and therefore impaired the value of its investment in Australia. Philip Morris transferred its shares in the Australian subsidiary to Hong Kong subsidiary. after the legislation was announced.

The Tribunal in this case refused its jurisdiction and made the following remarks:

> The Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection.[69]

Shortly before Philip Morris brought its claim against Australia, the then Government had announced on 11 April in its trade policy's statement, that it will no longer include ISDS in investment treaties negotiated in the future.[70]However, this government's

[67]Ibid [142].
[68]*(Jurisdiction and Admissibility)* (PCA Arbitral Tribunal, Case No 2012-12, 17 December 2015).
[69]Ibid [588].
[70]Department of Foreign Affairs and Trade, Australian Government, *Trade Policy Statement: Trading our way to more jobs and prosperity* (April 2011) The University of Sydney<http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf>.

approach changed and ISDS was included in FTA with Korea.[71]Following the conclusion of negotiation with Korea on FTA, the Government has since publicly stated that in the future it will consider ISDS in investment treaties on a case-by-case basis.[72] Subsequently, ISDS was not included in JAEPA, nonetheless, then concluded CHAFTA contains ISDS. Thus, this trend clearly shows that the Government negotiates ISDS in investment treaties on a case-by-case basis.

In addition to the above-mentioned FTAs without ISDS, ISDS is not embodied in the following FTAs: *Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement,*[73]*Australia-US Free Trade Agreement*[74]and *Malaysia-Australia Free Trade Agreement.*[75]All other BITs and FTAs with Australia otherwise stipulate ISDS mechanism.

2.4 Conclusion

The object of investment law is to protect investment of foreign investors. To benefit from protection stipulated in investment treaties both investor and investment controlled by him have to fall into the scope of such a treaty. Usually, most investment treaties and in the case of Australia, all BITs and some investments chapters of FTAs specify a broad definition of investment with a non-exhaustive list of covered assets. It follows that practically every asset, even though not specified as an example in a list, can be determined as investment. However, if investor wishes to bring its claim before ICSID tribunal its investment must correspond with the definition of investment under ICSID Convention. Nevertheless, settled criteria of this definition as contained in *Salini* test are adhered and applied differently by tribunals. Some investment chapters of FTAs with Australia provide a broad definition of investment, where, nonetheless, the scope of this definition is limited in terms that an asset has to have characteristics of investment.

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[71]*Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) ('KAFTA').
[72]Rowan Callick, *Korea ready to talk turkey after FTA hurdle removed* (2 November 2013) Bilaterals <http://bilaterals.org/?korea-ready-to-talk-turkey-after>; Department of Foreign Affairs and Trade, Australian Government, *Investor-State Dispute Settlement* <http://dfat.gov.au/trade/topics/pages/isds.aspx>.
[73]signed 16 February 2011, [2013] ATS 10 (entered into force 1 March 2013) ('ANZCERTA').
[74]signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).
[75]signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013) ('MAFTA').

Investors invoking protection under an investment treaty can be individuals or companies or its shareholders. They have to possess nationality of the Contracting state to utilize protection under the investment treaty. All BITs, except one BIT with Australia, use the test of incorporation and the test of incorporation in combination with the test of control for ascribing nationality. Whereas, investment chapters of FTAs with Australia stipulate only the criterion of incorporation for the nationality ascription. Only one BIT with Australia requires a 'stronger link' in the form of an actual economic activity of the investor in the home state to be attributed nationality. Even though that such the test of incorporation is susceptible to misuse by investors to benefit from protection under the investment treaty, so far there has been only one case of such a misuse in Australian history.

3 Legal Framework Governing Foreign Investment

Investment law is shaped by domestic law of the home state, multilateral investment treaties, bilateral investment treaties, treaties with investment provisions, other treaties related to investment, international customary law and general principles of law.

In this chapter these legal sources which govern foreign investments in Australia will be discussed, except customary law and general principles of law which will not be addressed any further. In addition, relationship between international law and domestic law of Australia will be introduced. Moreover, issue of transparency will be addressed.

3.1 Domestic Law

The respective law of Australia governs, among other aspects of foreign investment, which are mentioned below, the issue of the investment existence.

In relation to this, Douglas stated: 'Investments disputes are about investments, investments are about property, and property is about specific rights over things cognisable by the municipal law of the host state.'[76]

Therefore, whether a particular asset held in the territory of a state party to an investment treaty is an investment protected by the respective treaty is a matter for that

[76]Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) *74 British Yearbook of International Law* 151, 194.

treaty not domestic law; but in order for a particular asset to be able to qualify as an investment under the investment treaty, it must first exist and such existence is owed to the law of the territory in which such an asset is allegedly held.[77]This premise was confirmed by the Tribunal in the case of *EnCana Corporation v Ecuador*,[78]where it made the following observation:

'[…] for there to have been an expropriation of an investment or return […] the right affected must exist under the law which creates them, in this case, the law of Ecuador.'[79]

These proprietary and contractual rights in Australia are regulated by legislation made by the Commonwealth Parliament, the state or territory parliaments, the local governments and by the common law developed by the courts and found in judicial decisions. Nonetheless, detailed examination of such law is beyond the scope of this thesis.

Further, domestic law is relevant, for example, for validity of investment and the conditions imposed or assurance granted by national law for the operation of the investment.[80]Legislation in relation to screening of foreign investment is further discussed below in this chapter.

3.1.1 Relationship between International Law and Australian Law

Australia is a dualist country and international treaties must be incorporated into Australian domestic law to secure operation of individual rights and obligations. The terms of a treaty are not incorporated into Australian law until the Commonwealth Parliament passes legislation to give effect to that treaty.[81]Moreover, treaties can only become part of Australian law to the extent that they are expressly made part of Australian law by such legislation. If the Parliament merely adds the text of a treaty in the form of a

[77]Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 91.
[78]*(Award)* (LCIA Arbitral Tribunal, Case No UN3481, 3 February 2006).
[79]Ibid [184].
[80]Newcombe and Paradell, above n 77, 93.
[81]See, eg, *Chow Hung Ching v R* (1948) 77 CLR 449; *Bradley v Commonwealth* (1973) 128 CLR 557.

Schedule to an Act, this alone is not enough to incorporate the terms of that treaty into Australian law.[82]

Nonetheless, international law can have a significant indirect effect on Australian law. In relation to interpretation of domestic statues, in the case of *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs,*[83]the High Court of Australia confirmed the proposition that the courts should, in case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.[84]

In *Minister for Immigration and Ethnic Affairs v Teoh*[85]the High Court observed the following:

> […] the ratification of the Convention on […] was an adequate foundation for a legitimate expectation, in the absence of statutory or executive indications to the contrary, that administrative decision-makers, including the minister's delegate, would act in conformity with the Convention...[86]

Therefore, if the Commonwealth Parliament has not implemented an investment treaty into domestic law, an investor can rely on the doctrine of legitimate expectation before Australian courts. In addition, in the case of ambiguity of a statue, the court should interpret the statute in conformity with the respective investment treaty.

Nonetheless, in cases when an investor has the right under the investment treaty to bring a claim against the host state before an international tribunal in an investment dispute, the tribunal will apply the ratified investment treaty irrespective of whether the treaty was or was not incorporated into domestic law by the Commonwealth Parliament.

This premise follows from the principle that investment treaties are 'treaties' in accordance with art 2(1)(a) of *Vienna Convention on the Law of Treaties*[87]and *per se* governed by international law. Further, such treaties must be interpreted *inter alia* in the

[82]Alice De Jonge, 'Australia' in Wenhua Shan (ed), *The legal protection of foreign investment: a comparative study* (Hart Publishing, 2012) 131, 134.
[83](1992) 176 CLR 1.
[84]Ibid [41].
[85](1995) 183 CLR 273.
[86]Ibid [41].
[87]opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

light of any international rules.[88]The Tribunal in the case of *MTD v Chile*[89]confirmed application of international law on the investment treaty and stated the following:

> '[…] the parties have agreed to this arbitration under the BIT. This instrument being a treaty, the agreement to arbitrate under the BIT requires the Tribunal to apply international law.'[90]

3.1.2 Foreign Investment Review Framework

Screening of foreign investment in Australia is governed by the legislative framework which composes of the below stated acts, their associated regulations[91]and is further supported by Investment Policy. The acts include: *Foreign Acquisitions and Takeovers Act 1975* (Cth) ('FATA') that provides the legislative framework for the foreign investment screening regime, *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) that sets the fees for foreign investment applications and notices. and *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth) that regulates registration of interest in agricultural land held by foreign persons. The Investment Policy then provides guidance to foreign investors on the Government's approach to administering FATA.

Separate legislation in certain sensitive sectors imposes other requirements and/or limits on foreign investment. These sectors are the following: the banking sector, where foreign ownership is regulated by *Banking Act 1959* (Cth)., *Financial Sector (Shareholdings) Act 1998* (Cth) and national banking policy, airports regulated by *Airports Act 1996* (Cth) which limits foreign ownership of some airports to 49%, airlines, where foreign ownership in Qantas is limited to 49% under *Qantas Sale Act 1992* (Cth), the shipping industry governed by *Shipping Registration Act 1981* (Cth) which requires that a ship must be majority Australian-owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator, the telecommunications sector, where aggregate foreign ownership of Telstra is limited to 35% and individual foreign investors are only allowed a maximum of 5%.under *Telstra Corporation Act 1991* (Cth).

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[88]Ibid art 31(3)(c).
[89]*(Award)* (ICSID Arbitral Tribunal, Case No ARB/05/10, 25 May 2004).
[90]Ibid [87].
[91]*Foreign Acquisitions and Takeovers Regulation 2015* (Cth), *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (Cth) and *Register of Foreign Ownership of Agricultural Land Rule 2015* (Cth).

3.1.3 Transparency

Transparency is a crucial factor for foreign investors when investing in the host country. The non-existence of transparency brings other costs to a company due to the lack of information about activities and future intentions of the government and in the case of cross-border mergers and acquisitions it might slow down the whole process of the transaction.

Australia has confirmed its adherence to transparency as one of the basic rules underpinning protection and promotion of foreign investment. Australia is an adherent to the OECD instruments stipulating transparency from its signatory states as, for example, *Declaration on International Investment and Multinational Enterprises*.[92]Australia also actively participates in the OECD and the World Trade Organization ('WTO') initiatives promoting transparency. All IIAs concluded by Australia contain specific undertakings relating to transparent administration of laws and regulations. For example, *Australia-US Free Trade Agreement*[93]('AUSFTA') in its ch 20 stipulates undertakings considering transparency in relation to publication of laws and regulations, further in respect to process of administrative agencies and regarding review and appeal of actions by tribunals.

Comprehensive legal sources such as legislation and case law are provided to the public for free via Internet access by the Australasian Legal Information Institute[94]('AustLII'). The aim of AustLII, a government-supported facility, is to improve access to justice through easier access to legal information. In addition, there is also the Australian Treaties Database,[95]which provides an online resource for treaties to which Australia is a signatory. In relation to screening of investment, The Foreign Investment Review Board ('FIRB'), a non-statutory body advising the Treasurer and the Government on Investment Policy and its administration, maintains a website[96]containing details of its policy approach in relation to reviewing procedure of foreign investment, legislation

[92]OECD, *Declaration on International Investment and Multinational Enterprises* (25 May 2011) <http://www.oecd.org/investment/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm>.
[93]signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).
[94]available at http://www.austlii.edu.au.
[95]available at http://www.dfat.gov.au/treaties/index.html.
[96]http://www.firb.gov.au.

relevant to foreign investors and copies of all relevant investment approval applications. Further the website[97]of the Commonwealth Treasurer provides an access to recent foreign investment decisions and other documents related to foreign investment law and policy.

3.2 International Law

The primary source of international investment law are IIAs, discussed later, supplemented by the general rules of international law, including customary law and other treaties related to investment.

3.2.2 Multilateral Treaties

Despite of proliferation of IIAs, so far there has not been entered into any comprehensive agreement on a global scale on foreign investment, in contrast to international trade, where comprehensive trade agreements exist. However, there were efforts to draft such an agreement. One of these recent attempts was, for example, *Multilateral Agreement on Investment*[98]attempted by the OECD.

Within the WTO framework, three treaties of so called Uruguay Round Agreements contain provisions directly concerning foreign investment, namely *Agreement on Trade Related Aspects of Intellectual Property Rights*[99]('TRIPS'), *General Agreement on Trade in Services*[100]('GATS') and *Agreement on Trade-Related Investment Measures*[101]('TRIMS'). These agreements came into force for Australia on 1 January 1995. Nonetheless, these agreements deal with foreign investment in a fragmented manner. TRIPS deals with standards of protection of intellectual property. Since intellectual property falls into the list of investment in all IIAs with Australia, the link between TRIPS and foreign investment is clearly established. GATS covers foreign

[97]http://www.treasurer.gov.au.
[98]OECD, *Multilateral Agreement on Investment* (22 April 1998) <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.
[99]*Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*').
[100]*Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*').
[101]*Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Trade-Related Investment Measures*').

investment in the service sector and focuses not as IIAs on protection of investment, but rather on what is the main purpose of WTO, that is market access and non-discrimination.[102]TRIMS relates back to *General Agreement on Tariffs and Trade*[103]('GATT') and prevents member states from applying trade-related investment measures which are inconsistent with the provisions of art III (on national treatment) and art XI (on quantitative restrictions) of GATT. The annex to TRIMS contains an illustrative list of measures. The main aim of TRIMS is to prohibit the use of performance requirements which fall within the scope TRIMS and GATT.

Under the auspice of the World Bank, two organizations of which object is promotion of foreign investment were established, namely ICSID and the Multilateral Investment Guarantee Agency ('MIGA').

ICSID is an independent and depoliticized institution devoted to international investment disputes settlement between investors and states. States included ICSID as a forum for investor-state dispute settlement in most IIAs and investment contracts. ICSID was established in 1966 by ICSID Convention which has been ratified so far by 153[104]Contracting States and came into force for Australia on 1 June 1991.

MIGA provides political risk insurance to investors and promotes inflow of FDI into developing countries. MIGA was established in 1988 by *Convention Establishing the Multilateral Investment Guarantee Agency*[105]('MIGA Convention'). MIGA Convention came into force for Australia on 16 December 1998. Currently, 181[106]countries are members of MIGA, which of 156[107]are developing countries and 25[108]industrialized countries, including Australia.

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[102]Amarasinha, Stefan D and Juliane Kokott, 'Multilateral Investment Rules Revisited' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2012) 120, 123.

[103]*Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*').

[104]ICSID, *ICSID Convention* <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx>.

[105]opened for signature 11 October 1985, 1508 UNTS 99 (entered into force 12 April 1988).

[106]MIGA, *MIGA Member Countries* <https://www.miga.org/who-we-are/member-countries/>.

[107]Ibid.

[108]Ibid.

Finally, an instrument which is relevant for an investor-state arbitration is *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[109]('New York Convention') which provides for recognition and enforcement of foreign arbitral awards, including investor-state awards. Since there are many investor-state arbitration proceedings which are conducted outside the ICSID system and thus are not recognised and enforced under art 54 of ICSID Convention, New York Convention secures such enforcement and recognition of other investment awards. New York Convention was ratified by Australia on 26 March 1975.

3.2.3 Bilateral Treaties and Treaties with Investment Provisions

BITs and investment chapters of FTAs are important sources of investment law as they guarantee protection to foreign investors. The power to conclude treaties is an expression of state's sovereignty and it is for states to decide how to best protect and promote investment in their territory. Wording of BITs and investment provisions in other treaties is usually similar and contains similar provisions as, for example, the definition of investment and investor, standards of treatment and other standards, dispute resolution provisions between contracting states and between an investor and a host state.

Australia in comparison to other developed countries has not been very active in conclusion of BITs and FTAs. Australia is a party to 21 BITs[110]and 10 FTAs[111]containing an investment chapter which are in force. In addition, Australia is a party to already concluded TPP containing the investment provision, which is not yet in force. Further, 5[112]FTAs which are likely to provide investment provisions are currently under negotiation.

Australia as a developed country concluded BITs primarily with developing states to protect its investors in those countries. First BIT negotiated by Australia was with China in 1988. Foreign investment between Australia and China has increased since that time.

[109]opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).
[110]For a full list of BITs refer to Schedule 1 to this thesis.
[111]For a full list of FTAs refer to Schedule 2 to this thesis.
[112]Australia-Gulf Cooperation Council Free Trade Agreement; Indonesia-Australia Comprehensive Economic Partnership Agreement; Pacific Agreement on Closer Economic Relations Plus; Regional Comprehensive Economic Partnership; Australia-India Comprehensive Economic Cooperation Agreement.

However, China is not Australia's major investment partner as the highest volume of outflow and inflow investment is with the United States and the United Kingdom, respectively. The majority of Australia's BITs were closed during nineties with Asian, Post-Soviet Union countries, including *BIT between Australia and Czech Republic* in 1993, and Latin America countries. The second wave of BITs followed between years 2001 and 2005, when BITs with Egypt, Mexico, Sri Lanka and Turkey were closed.

3.3. Conclusion

Investment law in Australia is governed both by international and domestic law. The pivotal source of international law are BITs and FTAs. Nonetheless, international treaties have no direct effect in Australia unless incorporated through domestic legislation. If such a treaty is not incorporated, an investor, however, can invoke that treaty before international tribunals provided, that a treaty stipulates a right to bring a claim directly against the host State in investment arbitration proceedings. If there is no such right, the doctrine of legitimate expectation applies before Australian domestic courts. Australia is also a party to multilateral agreements which relate to foreign investment. The most important instruments of these agreements are ICSID and New York Conventions. In Australia, special legislation regulating foreign investment exists, where the most important piece of legislation is *Foreign Acquisitions and Takeovers Act 1975* (Cth) that governs screening of foreign investment. Australia adheres transparency in respect to foreign investment and all relevant law resources are available to the public for free via the Internet. AustLII is the most relevant platform for legal research. Moreover, all IIAs with Australia contain stipulations in relation to transparency.

4 Admission and Establishment of Investment

Under the rules of customary international law, no state is under an obligation to admit foreign investment in its territory, generally, or in any particular segments of its economy.[113]Thus it is the right of each government to decide whether to close the national economy to foreign investors. This includes the right of the government to determine the modalities for admission and establishment of foreign investment.[114]However, after

[113]Dolzer and Schreuer, above n 3, 7.
[114]Ibid 80.

admission, a host state is required to treat foreign investment and investors in accordance with local laws and the customary international law minimum standard of treatment.[115]

It has been generally distinguished between the right of 'admission' of foreign investment and the right of 'establishment'. Where, the former concerns the right of entry of the investment in principle, whereas the later pertains to the conditions under which the investor is allowed to carry out its business during the period of the investment. For an investor with a short-term business, the right of establishment will be of less importance than for one who needs to rely on a longer business presence in the host state.[116]The right of establishment entails not only a right to carry out business transactions in the host country, but also the right to set up a permanent business presence.[117]

4. 1 Treaty Models of Admission and Establishment

In most investment treaties, states do not undertake any substantial obligations with regard to investment admission.[118]There are two dominant IIAs models with respect to admission and establishment: pre-entry and post-entry. The major difference between these models is whether they provide national treatment and most-favoured-nation ('MFN') treatment with respect to admission and establishment.[119]Although the pre-entry national treatment obligation generally extends to both investment and investors, the majority of investment treaties that provide only for post-entry national treatment obligations extend the obligation only to investments or activities associated with investments and not to investors. One explanation for this difference is that the existence of substantive obligations is premised on an investment having been made in accordance with local laws. The omission of the reference to 'investor' in a post-entry provision thus means that national treatment does not apply to investors wishing to make investments.

[115]Newcombe and Paradell, above n 77, 133.
[116]Dolzer and Schreuer, above n 3, 80.
[117]Newcombe and Paradell, above n 77, 131.
[118]Wenhua Shan, 'General Report' in Wenhua Shan (ed), *The legal protection of foreign investment: a comparative study* (Hart Publishing, 2012) 3, 27.
[119]Newcombe and Paradell, above n 77, 133.

In the post-entry provision, national treatment only applies to investments already made in accordance with domestic law.[120]

All BITs concluded by Australia follow the post-entry model and provide no right of admission or establishment. A typical clause of such BITs with Australia reads as follows: 'Each Party shall encourage and promote investment in its territory by investors of the other Party and shall, in accordance with its laws and investment policies applicable from time to time, admit investment'.[121]Two BITs concluded by Australia, BIT with China[122]and BIT with Papua New Guinea[123]contain additional rights of the Contracting States in relation to refusal of admission of an investment. Under both BITs the Contracting states have the right to refuse an investment if the company's investment is controlled by nationals of any third country. Moreover, BIT with China provides the right of refusal of investment admission if the company has no substantial business activities in the territory of the other Contracting Party.

Unlike BITs, all FTAs concluded by Australia follow the pre-entry model and all provide national treatment and some also MFN treatment in relation to establishment of investment. Nonetheless, they do not accord such a right in relation to admission of investment. These treaties as they refer to investor and investment then guarantee such standards of treatment both for investments and investors. However, they all specify in their annexes a negative list of sectors and other activities, where national treatment and MFN treatment are not applicable. In the case of TAFTA and CHAFTA, they, however, provide in their annexes a positive list of sectors, where national and MFN treatment are accorded. All FTAs, excepting the below stated treaties that provide only national treatment, contain both national and MFN treatment regarding establishment of investment. Treaties without MFN treatment are these two: *Agreement Establishing the*

[120]Ibid 158.

[121]*Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments,* signed 3 May 2001, [2002] ATS 19 (entered into force 5 September 2002) art 3(1).

[122]*Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, signed 11 July 1988, [1988] ATS 14 (entered into force 11 July 1988) ('*BIT between Australia and China*').

[123]*Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments*, signed 3 September 1990, [1991] ATS 38 (entered into force 20 October 1991) ('*BIT between Australia and Papua New Guinea*').

Asean-Australia-New Zealand Free Trade Area[124]('AANZFTA') and *Singapore - Australia Free Trade Agreement*[125]('SAFTA').

In CHAFTA national treatment in relation to establishment is guaranteed only to investors of China investing in Australia and their investments. The same right is not secured for investors of Australia investing in China and their investments. Nevertheless, in relation to MFN treatment, the right of establishment is guaranteed both to investors of China investing in Australia and their investments as well as to investors of Australia investing in China and their investments.

4.2 Domestic Regulation

As a general right of admission and establishment is not provided in most IIAs, this right is regulated by the host state's foreign investment regime law, including conditions applying to the entry of foreign investments. Host states control the entry and operation of foreign investment through a variety of regulatory mechanisms. These can range from a complete ban on foreign investment to other forms of regulation, such as limiting the form or amount of foreign investment, or restricting the sectors and geographical areas in which investment is permitted. Some host states regularly screen foreign investments and may make admission and establishment conditional upon fulfilling specific requirements.[126]

4.2.1 Overview of Screening Regime in Australia

The admission regime for foreign investment in Australia is based on a presumption of openness to any investment, subject to various notification and approval requirements for very large investment proposals, or proposals in certain prescribed sensitive sectors.[127]Nevertheless, Australia is rated by OECD as a country with a restrictive regime in relation to the admission of foreign investment.[128]

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[124]signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).
[125]signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003).
[126]Newcombe and Paradell, above n 77, 132-3.
[127]Alice De Jonge, 'Australia' in Wenhua Shan (ed), *The legal protection of foreign investment: a comparative study* (Hart Publishing, 2012) 131, 142.
[128]Blanka Kalinova, Angel Palerm and Stephen Thomsen, 'OECD's FDI Restrictiveness Index: 2010 Update' (Working Paper, OECD, March 2010) 19 <https://www.oecd.org/daf/inv/investment-policy/WP-2010_3.pdf>.

As mentioned earlier in chapter 3, the screening of foreign investment is governed by FATA which deals with certain actions to acquire interests in securities, assets or Australian land, and actions taken in relation to entities (being corporations and unit trusts) and businesses, that have a connection to Australia.

The process under FATA is administered by the Australian Treasurer, presently The Honourable Scott Morrison MP, and FIRB. FIRB reviews proposals of foreign investors and makes recommendations to the Treasurer on whether these proposals are suitable for approval under Investment Policy. Function of FIRB is advisory only and responsibility for making decisions rests to the Treasurer.

FATA uses two key terms: significant and notifiable action. Under FATA investments which are referred to as a notifiable action must be notified to the Treasurer before an action is taken. Requirements for an action to be referred to as a notifiable action, which are specified in FATA, vary and are based on a number of factors, including, whether the investor is a foreign government or non-government investor, the type of acquisition, whether the acquisition is subject to monetary thresholds and other commitments under FATA. In contrast to a notifiable action, a significant action does not need to be notified to the Treasurer before an action is taken, however, the Treasurer may impose performance requirements on such an action, prohibit an action or order an action to be undone. Only some actions which are referred to as significant actions are also notifiable actions.

The Treasurer has wide powers and extensive discretion under FATA. The Treasurer can prevent proposed foreign investment proceedings and to order to undue the proposed transaction if he considers such investment contrary to the Australia's national interest.

The Treasurer must make a decision in relation to a proposal within 30[129]days of receiving the notice with the investment proposal, or within an additional period of up 90[130]days from the registration of an interim order. The Treasurer can make an interim order for the purpose of considering whether to make a prohibiting order.[131]Making such

[129]*Foreign Acquisition and Takeovers Act 1975* (Cth) s 77(5).
[130]Ibid s 68(2).
[131]Ibid s 68.

an order equips the Treasurer with the additional time for consideration in cases, where the more detailed scrutiny of the investment proposal is required.

For foreign investment proposals where notification under FATA is compulsory it is a criminal offence to begin implementing such a proposal unless notification has been given to the Treasurer. Or in the case that such notification has been given, the earliest of the following events has not occurred yet: the period of 40 days after the date of submission of the proposal to the Treasurer has not lapsed, further if an interim order is made, the time specified in the order has not lapsed, or finally the advice that the Government does not object to the person entering into that agreement has not been given.[132]

4.2.2. Foreign Person

As FATA regulates actions proposed by foreign persons, it is worth to exemplify the concept of foreign person. Definition of foreign person is provided in FATA and defines foreign person as follows:

(a) an individual not ordinarily resident in Australia; or

(b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

(c) a corporation in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or

(d) the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

(e) the trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds an aggregate substantial interest; or

(f) a foreign government; or

(g) any other person, or any other person that meets the conditions, prescribed by the regulations.

[132]Ibid s (82)2.

The definition of an ordinary resident is set out in s 5 of FATA and provides as follows:

(1) An individual who is not an Australian citizen is ordinarily resident in Australia at a particular time if and only if:

(a) the individual has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and

(b) at that time:

(i) the individual is in Australia and the individual's continued presence in Australia is not subject to any limitation as to time imposed by law; or

(ii) the individual is not in Australia but, immediately before the individual's most recent departure from Australia, the individual's continued presence in Australia was not subject to any limitation as to time imposed by law.

(2) Without limiting paragraph (1)(b), an individual's continued presence in Australia is subject to a limitation as to time imposed by law if the individual is an unlawful non-citizen within the meaning of the Migration Act 1958.

Further, the definition of foreign corporation is defined in FATA and means a foreign corporation to which paragraph 51(xx) of the Constitution applies. Para 51(xx) of the Constitution confers power to the Parliament to make laws with respect to foreign corporations. Meaning of foreign corporation for purposes of 51(xx) of the Constitution was defined under the common law as an entity that is formed under the law of a foreign country and is accorded corporate legal personality, either by that foreign law or by Australian law.[133]

Moreover, the term of foreign government is also defined in FATA as follows:

an entity (within the ordinary meaning of the term) that is:

(a) a body politic of a foreign country; or

(b) a body politic of part of a foreign country; or

(c) a part of a body politic mentioned in paragraph (a) or (b).

As can be seen, for a corporation and a trustee of a trust to qualify as a foreign person, the criterion of a substantial interest must be met. And such an interest must be hold in a

[133]See, eg, *New South Wales v Commonwealth* (1990) 169 CLR 482, 498.

corporation or in a trust either by a person who is not an ordinarily resident in Australia or by a foreign corporation or foreign government. It then follows, that even a corporation or a trust which is incorporated in Australia or has its seat in Australia and in which a person not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest, which is further discussed below, falls into the scope of FATA as it satisfies requirements for foreign person.

A person under FATA holds a substantial interest in an entity or a trust if:

(a) for an entity—the person holds an interest of at least 20% in the entity; or

(b) for a trust (including a unit trust)—the person, together with any one or more associates,[134]holds a beneficial interest in at least 20% of the income or property of the trust.

Aggregate interest then is established where 2 or more persons holds an interest of at least 40% in the entity or for a trust, persons, together with any one or more associates, holds a beneficial interest in at least 40% of the income or property of the trust.

The meaning of interest in an entity is specified in s 17(1) of FATA as follows:

A person holds an interest of a specified percentage in an entity if the person, alone or together with one or more associates of the person:

(a) is in a position to control at least that percentage of the voting power or potential voting power in the entity; or

(b) holds interests in at least that percentage of the issued securities in the entity; or

(c) would hold interests in at least that percentage of the issued securities in the entity if securities in the entity were issued or transferred as the result of the exercise of rights of a kind mentioned in paragraph 15(1)(b)[135]or (c).[136]

The threshold of a substantial interest was increased recently from 15% to 20% under *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) which came into

[134]Definition of associate is provided in s 6 of FATA and in general it means a person or entity related to a person.
[135]A person in exchange for an interest in a security, asset or trust – has a right to acquire such an interest under an option; or in exchange for an interest in Australian land – to acquire an option to acquire such an interest.
[136]A person has a right, other than by reason of having an interest under a trust, to have such an interest transferred to himself or herself or to his or her associate.

force on 1 December 2015. However, an aggregate substantial interest remained unchanged under this amendment.

As can be seen, provisions in relation to the determination of foreign person under FATA, as in contrast to the determination of nationality of investor in some IIAs, where in some cases, especially where the control test for the nationality determination is stipulated, are clear and easily ascertainable. This enforces legal certainty and transparency for foreign investors in Australia.

4.2.3 National Interest Test

The Australian Government welcomes foreign investment, nonetheless, at the same time when reviewing foreign investment proposals, it must assure that the national interest is protected. However, the general presumption is that foreign investment is beneficial as its role is important for the development of Australia's economy.

As mentioned earlier the Treasurer may prohibit a particular transaction if he is satisfied that such a transaction would be in contrast to the Australia's national interest. Foreign investment proposals are assessed by FIRB, which further advises the Treasurer on the national interest implications of such proposals. What is meant by the national interest is not defined in legislation and is decided on a case-by-case basis. That there is no definition of the national interest has its reasons. Dr Ashton Calvert, the then secretary of the Department of Foreign Affairs and Trade, in his speech to the Lowy Institute[137]made the following observations in this regard:

> I think it is important to recognise that the Australian national interest is something that is defined by the Australian Government and the Australian people. The national interest is not static, nor can it be defined in a mechanical way. It depends in part on prior strategic choices we have made, and is informed by the view we have of ourselves as a country, and by what we want to stand for. Finally, I believe we need to recognise that Australia's interests are global in scope and character, and that some of our interests are defined by geography and some are not.[138]

[137]The Lowy Institute is an independent, nonpartisan international policy think tank located in Sydney, Australia. Ranked as the Australia's leading think tank, it provides high-quality research and distinctive perspectives on the international trends shaping Australia and the world.
[138]Dr Ashton Calvert, 'The Evolving International Environment and Australia's National Interest' (Speech delivered at the conference, The Lowy Institute, 26 November 2003)

Similar comments concerning the national interest were made by the present chairman of FIRB, Brian Wilson, at the Northern Australia Food Futures Conference recently.[139]

The Investment Policy contains guidelines regarding which factors are taken into consideration by the Government when assessing foreign investment proposals against the national interest. These factors are following:

National security, where the extent of the possible effect of the investment on Australia's strategic and security interest is assessed. Competition – the Government considers whether the proposed investment may result in an investor gaining control over market pricing and production of a good or services in Australia. Impact on the economy and the community – the impact of plans to restructure an Australian corporation following an acquisition is considered by the Government. Further, the Government takes into account the nature of the funding of the acquisition and the level of Australian participation in the enterprise after the foreign investment comes to pass, as well as the interests of employees, creditors and other stakeholders. Moreover, the Government takes into consideration the extent of the further development of the project by the foreign investment and that a fair return for the Australian people will be ensured by the investment. Character of the investor - the Government considers the extent to which the investor operates on a transparent commercial basis and is subject to an adequate and transparent regulation and supervision. In addition, the Government also considers the corporate governance practices of foreign investors. Finally, the Government takes into consideration other Australian Government policies, such as impact on tax and environment.[140]

In addition to the above stated factors, when the Government considers foreign investment proposals in agriculture sector or in residential land, further aspects are scrutinized.

<http://dfat.gov.au/news/speeches/Pages/the-evolving-international-environment-and-australia-s-national-interest.aspx>.

[139]Anna Vidot, 'Foreign Investment Review Board chairman backs farmland register, defends national interest test', *The ABC* (online), (12 April 2016) <http://www.abc.net.au/news/2016-04-12/firb-chairman-defends-national-interest-test/7319992>.

[140]Foreign Investment Review Board, Australian Government, *Australia's foreign investment policy* (1 July 2016) <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>.

Where an investment proposal involves a foreign government investor, the Australian Government also considers if the investment has the commercial nature or if the investor may pursue broader political or strategic objectives that may be against the Australia's national interest. Where the investor is not wholly owned by the foreign government, the Government also takes into account the size, nature and composition of any non-government interests, including any restrictions on the exercise of their rights.[141]

The Government cooperates with various state agencies and bodies when making decisions and secures from them expert's opinions in this matter, when necessary.

In practice, however, rejections of investment proposals because of its inconsistency with the national interest are rare. Instead it is more common that conditions are imposed on the relevant investor and its investment to be consistent with the national interest. For example, FIRB's Annual Report 2014-2015 states that in 2014-2015 a total of 38,932 applications for foreign investment approval were considered, with 37,953 approved, zero rejected, 799 withdrawn and 180 exempt as not subject to Investment Policy or FATA.[142]

In 2015 also one divestiture order was issued. Such orders are made where an acquisition has already occurred and is subsequently assessed as being contrary to the national interest. The order concerned $39 million Sydney property which had been purchased by Golden Fast Foods Pty Ltd in contrary to FATA. This was the first divestiture order issued in around ten years.[143]In the years, 2013-2014, however, three applications were rejected, which represents less than 0,1 per cent all applications considered during this period. Of the three proposals rejected, two related to residential real estate, and the other related to the rejection of Archer Daniels Midland Company's proposed takeover of GrainCorp Limited.[144]As stated by the then Treasurer, The Honourable Joe Hockey, this proposal was one of the most complex cases in the history which came before FIRB and was one of the most significant proposed acquisitions of an

[141]Ibid.

[142]Foreign Investment Review Board, Australian Government, *Annual Report 14/15* <https://firb.gov.au/files/2016/03/FIRB-AR-2014-15.pdf>.

[143]Treasury, Australian Government, 'Treasurer orders foreign investor to sell illegally purchased $39 million Sydney mansion' (Media Release, 3 March 2015) <http://jbh.ministers.treasury.gov.au/media-release/011-2015/>.

[144]Foreign Investment Review Board, Australian Government, *Annual Report 13/14* < https://firb.gov.au/files/2015/11/FIRB-AR-2013-14.pdf>.

agricultural business in Australia's history. Generally, arguments for the rejection of the proposal were competition and broader community concerns.[145]

The most recently, the present Treasurer, The Honourable Scott Morrison MP, has given a preliminary decision rejecting the proposed $10bn sale of the New South Wales electricity network company, Ausgrid, on national security grounds.[146]This decision, however, can be changed where adjustments are made by a bidder or further conditions can be imposed on the investment by the Treasurer.

The Australia's national interest test was criticized by a number of authors. They criticized, for example, conducting of investments proposals review on a case-by-case basis as such a scrutiny is not fair and ultimately leads to the loss of the substantial amount of investment.[147]On the other hand, there are commentators who support the current screening regime of foreign investment proposals and claim that the current system have not deterred foreign investments and that the case-by-case review allows the Government flexibility over screening of foreign investment.[148]

4.3 Conclusion

A part of state sovereignty is to decide if the country will open its economy to foreign investment and under which conditions. Australia's approach to admission of foreign investment is liberal, and, in general, all investments which can contribute and develop the Australia's economy and are not against the national interest are welcomed and admitted. Admission and establishment are not generally covered in international investment treaties and therefore domestic legislation deals with these phases. The most relevant piece of legislation in Australia which regulates foreign investment is *Foreign Acquisitions and Takeovers Act 1975* (Cth). Under this act all investments which meet

[145]Treasury, Australian Government, 'Foreign investment application: Archer Daniels Midland Company's proposed acquisition of GrainCorp Limited' (Media Release, 29 November 2013) <http://jbh.ministers.treasury.gov.au/media-release/026-2013/>.
[146]Treasury, Australian Government, 'Foreign investment applications for the 99-year lease of Ausgrid' (Media Release, 11 August 2016) < http://sjm.ministers.treasury.gov.au/media-release/067-2016/>.
[147]See, eg, Tony Makin, *Capital Xenophobia and the National Interest* (December 2008) Institute of Public Affairs <https://ipa.org.au/library/publication/1229298839_document_makin.pdf>; Jeff Rae, *Counting the Costs of Regulation* (November 2008) Institute of Public Affairs <https://ipa.org.au/library/publication/1229298979_document_rae.pdf>.
[148]Mark Thirlwell, *Is the Foreign Investment Review Board Acting Fairly?* (December 2008) Institute of Public Affairs <https://www.ipa.org.au/library/publication/1229471411_document_thirwell_updated.pdf>.

the criteria there specified and are proposed by a foreign person, which can be an individual, corporation, government or trustee of the trust, must be notified to the Treasurer. The Treasurer is given extensive powers under FATA and can ban or state to be undone investments which are contrary to the national interest. However, the concept of the national interest is not defined in legislation and thus its determination is within the sole power of the Government. That there is no definition of the national interest enables the Government flexibility in its judgment on investment proposals. Nevertheless, the Government provided guidelines for investors regarding the scope within which the national interest is reviewed. But still investment proposals against the national interest test are reviewed on a case-by-case basis. Even though that the screening regime of foreign investment in Australia was declared as strict by OECD, there are just few investment proposals rejected each year because of their inconsistency with the national interest as FIRB's annual reports show.

5 Standards of Treatment and Other Substantive Standards in BITs and FTAs with Australia

This chapter analyses and provides an overview of the most common standards of treatment and other substantive standards contained in BITs and FTAs entered into by Australia.

Once investment has been admitted in the host state, there are standards contained in almost all investment treaties under which investment must be treated by the host state. As pointed out before, the main aim of investment treaties is to provide protection to foreign investment. States are free to negotiate which standards they wish to guarantee investors of the other contracting party. Investors' claims against a host state are then based upon a respective breach of a standard guaranteed in an investment treaty. However, standards in investment treaties subject to variations and may be interpreted differently by arbitration tribunals.

In relation to interpretation of standards, as in the case of interpretation of other clauses in investment treaties, they shall be interpreted in accordance with *Vienna Convention on*

the Law of Treaties[149]and consistently with good faith, the ordinary meaning of words and pursuant to their purpose and object.[150]

5.1 Standards of Treatment

The most common standards of treatment established in international investment treaties are: the international minimum standard of treatment, national treatment, MFN treatment, fair and equitable treatment and the full protection and security. All these standards of treatment as embodied in investment treaties with Australia will be discussed in this chapter.

5.1.1 Minimum Standard of Treatment

Many investment treaties refer in their text to the minimum standard of treatment. The minimum standard of treatment provides a treaty-defined baseline[151]or, in the words of one tribunal: 'a floor below which treatment of foreign investors must not fall, even if a government was not acting in a discriminatory manner.'[152]

There is the division of views among states as to the existence of the international minimum standard of treatment and thus it cannot be said with certainty that there is the international minimum standard of treatment of foreign investment in customary international law where its violation would result in state responsibility. However, where an investment treaty refers to the international minimum standard, the treaty then undoubtedly establishes the existence of this standard between the parties.[153]

The content of the international minimum standard is also difficult to identify. Tribunals confirmed that the concept of the international minimum standard is not static and is constantly in the process of development.[154]The highly cited case concerning the content of the international minimum standard, 1926 *Neer* case,[155]is nonetheless of little value regarding the formulation of the minimum standard for the purpose of claims under

[149]opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[150]Ibid art 31.
[151]Newcombe and Paradell, above n 77, 233.
[152]*S.D. Myers, Inc. v Government of Canada (Partial Award)* (NAFTA Tribunal, 13 November 2000) [259].
[153]Sornarajah, above n 7, 328.
[154]Newcombe and Paradell, above n 77, 236.
[155]*L. F. H. Neer and Pauline Neer (U.S.A.) v United Mexican States (USA v Mexico) (Awards)* (1926) 4 RIAA 138.

investment treaties, since this case did not deal with the treatment by the state itself of foreigners or their property. Its importance is more in its articulation of the now well-accepted principle that state treatment of aliens and their property is to be measured against the international minimum standard.[156]In the case of *Glamis Gold v United States*,[157]the Tribunal made the following observations in this regard:

> Although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1).[158]

The above case shows some situations which tribunals take into consideration while deciding whether the minimum standard was breached by the host state. They assess whether certain acts when exceeded by the host state beyond the certain threshold, which is quite high, are regarded for the elements of breach of the international minimum standard, including, but not limited to denial of justice, lack of due process, arbitrariness, discrimination and non-transparency.

Reference to the international minimum standard is not provided in any BITs with Australia. Nevertheless, in all FTAs, except TAFTA, AANZFTA and CHAFTA, there is a provision covering the international minimum standard. However, in CHAFTA the Parties obliged each other to negotiate and include provisions concerning the minimum standard of treatment and as well as other subjective standards which are not currently present in CHAFTA, namely, expropriation and transfer of funds within 3 years from its coming into force.[159]

The wording of the international minimum standard provision is almost identical in all FTAs with Australia, for example, in AUSFTA it reads as follows:

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[156]Newcombe and Paradell, above n 77, 236.
[157]*Glamis Gold Ltd v United States (Award)* (NAFTA Tribunal, 8 June 2009).
[158]Ibid [616].
[159]CHAFTA, art 9.9(3).

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. For greater certainty, the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.[160]

As can be seen from the provision above, the Parties clearly expressed their intention to accord investment the minimum standard of treatment in accordance with international customary law so application of this standard and its scope is certain. Other standards of treatment, namely, the fair and equitable treatment and full protection and security standards are covered under the minimum standard of treatment provision in all FTAs which accord the international minimum standard. Then these FTAs further specify that these two standards do not provide additional rights or treatment beyond the standard required by international customary law. It follows then that these two standards cannot be interpreted autonomously from the minimum standard of treatment and possibly extend rights beyond the international minimum standard. The Parties in these treaties clearly expressed their intention to limit the above referred standards to the scope accorded under the international minimum standard.

[160]AUSFTA, ch 11 art 11.5.

Regarding the meaning of international customary law, 4 FTAs[161]further contain in their annexes to investment chapters the mutual understanding of the Parties regarding the concept of international customary law.

5.1.2 National Treatment

The purpose of the national treatment clause is to oblige a host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulation and thus to promote the position of the foreign investor to the level accorded to nationals.[162]

A national treatment obligation confers a relative or contingent standard of treatment and does not bestow an absolute or minimum standard of treatment. It is an empty shell that obtains substantive content in relation to the treatment afforded to someone or something else. The legal analysis involves a comparison between the host state's treatment of domestic and foreign investors or domestic and foreign investments. Unlike an absolute or the minimum standard of treatment provision, the national treatment standard does not have any intrinsic substantive content. The required standard of treatment depends on the treatment of the applicable treaty-defined comparator.[163]

National treatment obligations appear in 4 BITs[164]and in all FTAs with Australia. However, there are significant variations between clauses, including whether the obligation: (i) is expressly subject to national law; (ii) appears in the same clause with MFN treatment; (iii) applies to establishment; (iv) applies to both investors and investments; (v) specifies the types of activities to which it applies, (vi) contains an express comparator, such as 'in like circumstances' and, (vii) how describes the applicable standard of treatment. as, for example, 'no less favourable treatment'. These all variations and their combinations appear in investment treaties with Australia and are discussed in more detail below.

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[161]*Australia – Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) ('AClFTA'); AUSFTA; KAFTA; TPP.
[162]Dolzer and Schreuer, above n 3, 178.
[163]Newcombe and Paradell, above n 77, 147-8.
[164]*BIT between Australia and Argentina*; *BIT between Australia and India*; *BIT between Australia and Mexico*; *BIT between Australia and Turkey*.

Guaranteed national treatment obligation which subject to the laws of the contracting party is contained in those 4 BITs mentioned above and reads as follows:

> Each Contracting Party shall, subject to its laws, regulations and investment policies, grant to investments made in its territory by investors of the other Contracting Party treatment no less favourable than that which it accords to investments of its own investors.[165]

This provision suggests that laws, regulations and investment policies can provide for *de jure* distinctions in treatment between domestic and foreign investments, but foreign investment should not receive less favourable treatment in the application of laws, regulations and investment policies than domestic investments.

An only example where national and MFN treatment are combined together in one clause is in *BIT between Australia and Argentina* and which provides:

> Each Contracting Party shall accord to investments by investors of the other Contracting Party, made in its territory, treatment which is not less favourable than that which it accords to investments of investors of any third country and, subject to its laws, regulations and investment policies, than that which it accords to investments by its own investors […].[166]

In relation to whether the national treatment obligations are guaranteed with respect to establishment and whether they are secured for investors or investments, all BITs with the national treatment clause do not accord national treatment in respect to establishment and after establishment, they secure this right to investments only and not investors. Conversely, all FTAs grant national treatment with respect to establishment and accord it to both investment and investors. Nonetheless, all FTAs then contain exclusion clauses with listed situations when the national treatment is not accorded.

Typical national treatment clause in FTAs reads as follows:

> Each Party shall accord to investors of the other Party and covered investments treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[167]

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[165] *BIT between Australia and India* art 4(1).
[166] *BIT between Australia and Argentina,* art 5.
[167] ANZCERTA, art 5.

In some FTAs, however, this provision is divided into two subsections, where one refers to investment and the second refers to investors as, for instance, in AUSFTA which stipulates as follows:

> 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[168]

As can be seen, this clause covers establishment and relates both to investor and investment. Moreover, it specifies the activities where national treatment is granted, namely: establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition. In addition, it contains an express comparator.

The comparator 'in like circumstances' is present in all FTAs and in *BIT between Australia and Mexico.* The only other BIT which contains an express comparator, *BIT between Australia and Turkey*, embodied a comparator 'in similar situations.'

Nonetheless, whether the express comparator is expressly stipulated in an investment treaty or not, is arguably not legally significant. This follows from both the logic and structure of national treatment provisions, which prohibit nationality-based discrimination. The relevant inquiry is whether differences in treatment are attributable directly or indirectly to nationality of the investor or investment. This necessarily requires a comparison of investors or investments that are in like circumstances – the logic of any discrimination analysis being to compare like with like.[169]

Moreover, the above stated clause then specifies the applicable standard of treatment 'no less favourable treatment', which is contained in all FTAs and BITs containing the national treatment clause.

[168]AUSFTA, ch 11 art 11.3.
[169]Newcombe and Paradell, above n 77, 160.

In the case of *Pope & Talbot Inc v Canada*[170]the Tribunal relying on GATT jurisprudence concluded that the treatment 'no less favourable treatment' provides for the best treatment afforded to any one national.[171]It follows then, if a national investor in like circumstances is provided preferential treatment, the foreigner is entitled to no less favourable treatment, even if other similarly situated national investors are not provided comparable treatment. This approach means that a state cannot aggregate the favourable and non-favourable treatment that it accords to national investors and then compare the average treatment afforded to nationals with the treatment afforded to foreign investors.[172]

5.1.3 MFN Treatment

MFN treatment obligations require that state conduct does not discriminate between similarly situated persons, entities, goods, services or investments of different foreign nationalities. As with national treatment, MFN treatment is a relative standard – the required standard of treatment in international investment agreements depends on the treatment of similarly situated foreign investors or investments. MFN treatment ensures that, within a host state, there is equality of competitive opportunities between investors and investments from different states.[173]

MFN treatment obligations are contained in all BITs with Australia and in all FTAs, exempt of SAFTA and AANZFTA, where MFN treatment clause is not stipulated. As in the case of national treatment obligations, MFN treatment clauses are provided in different variations. MFN treatment clauses are quite homogenised with slightly differences between those in BITs and FTAs.

A typical clause covering MFN treatment provides as follows:

> A Contracting Party shall at all times treat investments in its own territory, including compensation under Article 7 and transfers under Article 8, on a basis no less favourable than that accorded to investments of investors of any third country, provided that a Contracting Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from:

[170]*(Award on the Merits of Phase 2)* (NAFTA Tribunal, 10 April 2001).
[171]Ibid [68].
[172]Newcombe and Paradell, above n 77, 186.
[173]Ibid 192.

(a) any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or

(b) the provisions of a double taxation agreement with a third country.[174]

This provision accords MFN treatment rights only to investment and not to investors and it is not guaranteed in relation to establishment. Just 4 BITs[175]provide MFN treatment for both investors and investments and they further specify, with the exception of *BIT between Australia and Romania,* activities to which MFN treatment in relation to investors applies. Nonetheless, these 4 BITs does not accord MFN in respect to establishment. Unlike to BITs, in all FTAs MFN treatment to both investment and investors is accorded and is stipulated in respect of establishment.

It can be seen, that the above provision contains, like national treatment provisions, the applicable standard of treatment 'no less favourable'. This applicable standard is embodied in all BITs and FTAs. No BIT with MFN provision does not contain an express comparator as national treatment clauses. However, an express comparator 'in like circumstances' is present in all FTAs containing the MFN treatment clause. Nonetheless, as stated in the previous chapter regarding national treatment, absence of an express comparator is legally irrelevant.

In addition, all BITs contain a provision stipulating cases where the party is not obliged to extend MFN treatment to investments of the other party as, for example, benefits resulting from taxation or other economic agreements to which the party belongs. All FTAs, as in the case of the national treatment standard, then contain exclusion provisions which defines in which situations MFN treatment does not apply. Further, all MFN clauses in FTAs list activities to which MFN treatment applies.

In 4 FTAs[176]there is also a provision which states that MFN treatment does not apply to dispute settlement procedures. In treaties, where there is no such reference to dispute settlement concerning the MFN treatment provision, it is not clear whether the MFN

[174]*BIT between Australia and Czech Republic,* art 4.
[175]*BIT between Australia and Hong Kong*; *BIT between Australia and India*; *BIT between Australia and Indonesia*; *BIT between Australia and Romania*.
[176]ANZCERTA; CHAFTA; JAEPA; TPP.

treatment provision guarantees MFN treatment to dispute settlement as tribunals have decided this issue differently.[177]

5.1.4 Fair and Equitable Treatment

The concept of fair and equitable treatment ('FET') is contained in most BITs and FTAs and is the most frequently invoked standard in investment disputes.[178]FET is a non-contingent standard which provides for rule-making in independent terms, without reference to the treatment of others.[179]The purpose of the clause of fair and equitable treatment in investment treaties is to fill gaps that may be left by the more specific standards in order to obtain the level of investor protection intended in treaties.[180]

There was extensive discussion whether the concept of FET merely reflects the international minimum standard or if it is an autonomous standard additional to international law. Professor Schreuer pointed out in this regard:

> it seems implausible that a treaty would refer to a well-known concept like the minimum standard of treatment in customary international law by using the expression of fair and equitable treatment. If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression.[181]

Thus, it can be agreed that in the cases where the parties embodied FET in a treaty without reference to the minimum standard of treatment, FET should be interpreted by the tribunal independently from the international minimum standard and may also be interpreted more extensively than the minimum standard of treatment.

FET is a broad concept and its interpretation depends on specific facts of each individual case. Practice of tribunals shows situations which make part of FET as for example: transparency, stability, investor's legitimate expectations, compliance with contractual obligations, procedural propriety and due process, good faith and freedom from coercion and harassment.[182]

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[177]Newcombe and Paradell, above n 77, 204.
[178]Dolzer and Schreuer, above n 3, 119.
[179]Haeri Hussein, 'A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law: The Gillis Wetter Prize' (2011) 27 *Arbitration International* 27, 33.
[180]Dolzer and Schreuer, above n 3, 122.
[181]Ibid 124.
[182]Ibid 133-147.

All BITs and as well as all FTAs, except CHAFTA, accord FET to investments. Nevertheless, the wording of FET in BITs and FTAs differs. In FTAs, except TAFTA and AANZFTA, FET is provided together with the standard of full protection and security under the minimum standard of treatment clause. TAFTA does not contain the minimum standard of treatment and does not refer to international customary law in relation to FET. AANFTA does not also provide the minimum standard of treatment, however, it refers to application of international customary law in relation to FET. Regarding the relationship between FET and international customary law, in all FTAs, except TAFTA, there is clarification that FET does not require treatment in addition to or beyond that which is required under the international law and does not create additional substantive rights. Moreover, all FTA, except for TAFTA and JAEPA, which do not provide any other specification in relation to FET, specify that FET includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Two FTAs, AANZFTA and MAFTA than provide a broader definition in relation to the Contracting State's obligations and provide that FET requires each Party not to deny justice in any legal or administrative proceedings.

For the typical wording of FET clause contained in FTAs, refer to chapter 5.1.1 which provides the minimum standard provision which includes FET.

Unlike the wording of FET in FTAs, BITs just provide that fair and equitable treatment is accorded or that it should be ensured to investment by the contracting parties. Some BITs[183]also as FTAs stipulate FET within the same clause together with the full protection and security standard.

In addition, one BIT, *BIT between Australia and Turkey* refers to FET also in its preamble and reads: 'AGREEING that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilisation of economic resources;' The preamble then might be relevant in interpretation of FET clause and for ascertaining its content.

As FTAs contain an explanation that FET does not provide any rights beyond or in addition to them ensured under international customary law, in the case of BITs there is

[183]*BIT between Australia and Hong Kong*; *BIT between Australia and Mexico*; *BIT between Australia and Papua New Guinea*; *BIT between Australia and Turkey*.

no such limitation and tribunals can interpret FET independently and also interpret it extensively beyond the scope under international customary law.

5.1.5 Full Protection and Security

The incorporation of the standard of full protection and security oblige the host state to take active measures to protect investment from adverse effects. Traditionally, the ratio of this standard was to protect investors against physical violence, but the contemporary understanding as supported by the case law extends beyond physical violence and protects against legal infringement of investors' rights by the host state as well. There is broad consensus that the standard does not guarantee an absolute protection against physical and legal infringement. The test is whether the host state exercised 'due diligence' and took reasonable measures to protect investment.[184]

Some treaties tie the full protection and security standard to international law. As in the case of FET, there is an issue whether the full protection and security standard is an autonomous concept which can be extended beyond the minimum standard required by international customary law or if it is identical with the international minimum standard. In the case of *Elettronica Sicula S.P.A.*[185]the International Court of Justice ('ICJ') suggested that the full protection and security standard may go further than general international law.[186]

The standard of full protection and security is embodied in all BITs, with the exception of BIT with Philippines.[187]Also all FTAs, apart from CHAFTA, provide the standard of full protection and security as well.

All FTAs, except for FATA, AANZFTA and JAEPA, contain either the same or slightly different, but without any legal relevance wording of the full protection and security clause. For a typical formulation of this clause refer to chapter 5.1.1 which provides the wording of the minimum standard. FATA only provides that full protection and security is ensured. In AANZFTA full protection and security right is not embodied

[184]Dolzer and Schreuer, above n 3, 149-150.
[185]*Elettronica Sicula S.P.A. (United States of America v Italy) (Judgement)* [1989] ICJ Rep 15.
[186]Ibid 55.
[187]*Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments, and Protocol*, signed 8 December 1995, [1995] ATS 28 (entered into force 8 December 1995).

under the minimum standard clause. JAEPA then does not provide clarification on the meaning of full protection and security as other FTAs.

All FTAs, except those mentioned above, specify that concept of full protection and security does not extend beyond its meaning under customary international law. Further, they state that full protection and security guarantees only physical or police protection and security and as such expressly excludes application of legal protection.

Unlike the wording of the standard of full protection and security in FTAs, all BITs do not provide such the detailed wording as FTAs and just stipulate that protection and security is accorded or shall be ensured by the contracting party. They also, except some BITs stated below, do not contain the term 'full' or any other adjective preceding the concept 'protection and security' Four BITs[188]and all FTAs refer to the wording full protection and security.

Such an omission of the word 'full' may be of importance when deciding whether the concept of protection and security in a particular treaty accords beside physical protection also legal protection. As in contrary to FTAs, BITs do not contain an expressed statement excluding legal protection from application under the protection and security standard.

As in the case of *Biwater Gauff v Tanzania*[189]the Tribunal stated:

> The Arbitral Tribunal adheres to the *Azurix* holding that when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.

From the case above, it can be seen that tribunals are more willing to find legal protection under the protection and security standard in a treaty when the concept 'protection and security' is preceded by any qualifying term such as 'full'.

[188]*BIT between Australia and Hong Kong*; *BIT between Australia and Mexico, BIT between Australia and Papua New Guinea*; *BIT between Australia and Sri Lanka.*
[189]*(Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008).

Further to the issue whether legal protection is accorded under the concept of full protection and security, the Tribunal in the case of *Vivendi v Argentina*[190]pointed out:

> If the parties to the BIT had intended to limit the obligation to "physical interferences", they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, [….].[191]

It follows then, depending on the wording of a specific treaty, that tribunals are not in favour to limit the scope of full protection and security to physical infringement where the parties did not express such the intention. If the parties wished to limit the scope to physical infringement, they would state it in the treaty. Thus, if a tribunal will find legal protection under the full protection and security provision in the BITs with Australia, will depend on facts of each case and interpretation of a specific treaty by a tribunal.

Only one investment treaty, *BIT between Australia and Argentina*, expressly stipulates that full legal protection and security is granted to investments.[192]

5.2 Other Substantive Standards

This chapter deals with some other typical substantive standards contained in investment treaties. The following standards contained in BITs and FTAs with Australia are exemplified in this chapter: protection from expropriation without compensation, non-impairment by arbitrary or discriminatory measures, entry and sojourn of personnel, free transfer of investment and returns, the umbrella clause, compensation in the event of war or strife and preservation of rights.

5.2.1 Protection from Expropriation without Compensation

It is recognized in international law that a host state has a right to expropriate property of aliens. However, there are requirements which must be fulfilled by a host state to constitute legal expropriation. The preconditions which must be fulfilled cumulatively are as follows: the expropriation must be for a public purpose, non-discriminatory and

[190]*(Award)* (ICSID Arbitral Tribunal, Case No ARB/97/3, 20 August 2007).
[191]Ibid 206 [7.4.15.].
[192]*BIT between Australia and Argentina,* art 4.

non-arbitrary, and accompanied by prompt, adequate and effective compensation, and under some treaties also in accordance with due process.[193]A public purpose and non-discriminatory conditions occur in all BITs and are part of customary international law. A compensation requirement is controversial and does not form part of customary international law and it is upon the parties to regulate this requirement in investment treaties.[194]Due process is an expression of the minimum standard under customary international law and the requirement of fair and equitable treatment. Thus, it is not clear whether such a clause in the context of the rule on expropriation, adds an independent requirement for the legality of the expropriation.[195]

There are two forms of expropriation: direct and indirect. While direct expropriation has become rare nowadays, indirect expropriation has gained in importance. In the case of indirect expropriation, the investor's title is unaffected by the measure but divests him of the possibility of investment utilization.[196]

Regarding the issue if there was indirect expropriation, international law looks to the effect of the government measures on the investor's property, this approach has been defined as the 'sole effect doctrine' because the focus of the analysis is the effect of the state measure on the investment. The effects-based approach is considered in the commonly cited case regarding a definition of expropriation[197]in *Starrett Housing Corporation v. Iran*[198], where the tribunal held that:

> […] it is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[199]

[193]Dolzer and Schreuer, above n 3, 89-91.
[194]Sornarajah, above n 7, 240.
[195]Dolzer and Schreuer, above n 3, 91.
[196]Ibid 92.
[197]Newcombe and Paradell, above n 77, 325.
[198]*(Interlocutory Award)* (1983) 4 Iran-US CTR 122.
[199]Ibid 154.

Nowadays, all modern investment treaties contain specific provisions in relation to expropriation and typically address only the conditions and consequences of an expropriation, leaving the right to expropriate as such unaffected.[200]

All BITs and FTAs, with the exception of CHAFTA, concluded with Australia contain a provision in relation to expropriation. A typical expropriation provision in BITs and FTAs with Australia reads as follows:

> 1. Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the investments of investors of the other Contracting Party unless the following conditions are complied with:
>
> (a) the expropriation is for a public purpose related to the internal needs of that Contracting Party and under due process of law;
>
> (b) the expropriation is non-discriminatory; and
>
> (c) the expropriation is accompanied by the payment of prompt, adequate and effective compensation.
>
> 2. The compensation referred to in paragraph 1 of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation became public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors.
>
> 3. The compensation referred to in paragraph 1 of this Agreement shall include interest from the date of expropriation at a commercially reasonable rate, shall be paid without delay and shall be effectively realisable and freely transferable between the territories of the Contracting Parties.[201]

[200] Dolzer and Schreuer, above n 3, 89.

[201] *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol*, signed 23 August 1995, [1997] ATS 4 (entered into force 11 January 1997) art 7. ('*BIT between Australia and Argentina*').

The wording of the above stated expropriation provision is contained in all BITs concluded with Australia with an exemption of 4 BITs.[202]The clause stipulates only requirements for expropriation and conditions regarding compensation for expropriation and leave other law-related aspects of expropriation to domestic law. As can be seen, the provision also covers indirect expropriation by reference to 'measures having effect equivalent to nationalisation or expropriation'. This expression also emphasizes the effect-based approach. In contrary, some BITs expressly refer to direct and indirect expropriation as *BIT between Australia and Mexico* expressly provides direct or indirect expropriation or nationalization of an investment in art 7. *BIT between Australian and Sri Lanka* also expressly highlights direct or indirect expropriation of an investment.[203]Further, *BIT between Australia and India* does not stipulate the requirement that expropriation or nationalization has to be under due process law, it only states that it has to be in accordance with the law of the Contracting Parties.[204]In relation to compensation, both *BIT between Australia and India* and *BIT between Australia and Hong Kong* do not impose other requirement on compensation except requirements on calculation of compensation and its payment.[205]

Regarding expropriation clause in FTAs with Australia, both SAFTA and TAFTA contain similar wording as BITs. Wording of the expropriation clause in other FTAs is almost identical and all FTAs expressly refer to direct and indirect expropriation. In addition, 6 FTAs[206]contain an annex with the explanation concerning expropriation. Such an annex then explains the meaning of a direct and indirect expropriation. Further, an annex specifies cases which cannot constitute an expropriation, for example, annex 12 of JAEPA stipulates as follows:

[202]*BIT between Australia and Mexico*; *BIT between Australia and Hong Kong*'; *BIT between Australia and India*; *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments*, signed 12 November 2002, [2007] ATS 22 (entered into force 14 March 2007) ('*BIT between Australia and Sri Lanka*')*.*
[203]*BIT between Australia and Sri Lanka,* art 7.
[204]*BIT between Australia and India,* art 7.
[205]*BIT between Australia and India,* art 7; *BIT between Australia and Hong Kong,* art 6.
[206]AUSFTA; AANZFTA; JAEPA; TPP; KAFTA; AClFTA.

'An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.[207]

and further stipulates:

> Except in rare circumstances, such as when an action or a series of actions by a Party is so severe in light of its purpose that it cannot be reasonably viewed as having been applied in good faith, non-discriminatory regulatory actions designed and applied by the Party for the purpose of legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriation.[208]

In addition, in relation to an indirect expropriation, the appendix stipulates that the determination is on a case-by-case basis and considers, among others, the following factors:

> (a) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (c) the character of the government action, including its objectives.[209]

Moreover, all FTAs, except SAFTA and TAFTA, provide a detailed specification in relation to compensation and its attributes of adequacy, efficiency and promptness and which provide as follows:

> The compensation […] shall:
>
> be paid without delay;
>
> be equivalent to the fair market value of the expropriated investment at the time when or immediately before the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable;
>
> not reflect any change in value because the intended expropriation had become known earlier; and

[207] JAEPA, annex 12 art 1.
[208] Ibid art 4.
[209] Ibid art 3.

be effectively realisable and freely transferable between the territories of the Parties.[210]

Finally, all FTAs with an exemption of TAFTA provide that relevant provisions determining expropriation and nationalization do not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

In relation to compensation, all BITs and FTAs stipulate full compensation of an investment to an investor as determined by the fair market value of an investment and in the case of *BIT between Australia and Hong Kong* ascertained by the real value of the investment.

5.2.2 Non-impairment by Arbitrary or Discriminatory Measures

In treaty practice, the rule against arbitrariness is often combined with the prohibition of discrimination.[211]This is also the case in all BITs concluded by Australia which contain the standard of non-impairment by arbitrariness, except *BIT between Australia and Turkey*, which does not refer to discriminatory measures.

Some treaties, do not refer explicitly to 'arbitrary' but instead they use words such as 'unjustified' or 'unreasonable'. In the case of BITs with Australia, only 2 BITs[212]refer to arbitrary measures. However, it would be difficult to identify a difference between 'arbitrary' and 'unjustified' or 'unreasonable', thus it can be presumed that these terms are interchangeable.[213]

In arbitral practice, breach of the non-impairment standard is rarely relied upon by investors as the principal or exclusive basis of their case. This standard is usually asserted alternatively or cumulatively with breaches of other related standards, including expropriation, breach of fair and equitable treatment and failure to provide full protection and security.[214]The distinction between the non-impairment standard and other above referred standards is not clear and often the non-impairment standard considering its breadth overlaps with those other standards.

[210]AANZFTA, ch 11 art 9(2).
[211]Dolzer and Schreuer, above n 3, 173.
[212]*BIT between Australia and Turkey*; *BIT between Australia and Papua New Guinea*.
[213]Dolzer and Schreuer, above n 3, 173.
[214]August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 89-90.

The non-impairment standard is contained in 5 BITs[215]with Australia, in contrary, no FTA with Australia contains such a standard. The wording of the non-impairment standard in all 5 BITs is similar, for example, *BIT between Australia and Argentina*, provides:

'A Contracting Party […] without prejudice to its law, shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments […].'[216]

5.2.3 Entry and Sojourn of Personnel

The standard of entry and sojourn of personnel accords an investor the right subject to the laws of the host state to enter, remain and to employ key managerial personnel in the territory of the host state. This right is embodied in all BITs with Australia and, except 2 BITs,[217]is also contained in a separate provision. In contrary, no FTA guarantees such a right in relation to investment. A typical entry and sojourn of personnel clause reads as follows:

> (1) A Contracting Party shall, subject to its laws relating to the entry and sojourn of non-citizens, permit natural persons who are nationals of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.
>
> (2) A Contracting Party shall, subject to its laws, permit investors of the other Contracting Party who have made investments in the territory of the first Contracting Party to employ within its territory key technical and managerial personnel of their choice regardless of citizenship.[218]

5.2.4 Free Transfer of Investment and Returns

By this provision the contracting states oblige themselves to permit all transfers relating to a covered investment in a freely usable currency out and into their territory.

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[215]ANZCERTA; *BIT between Australia and Hong Kong*; *BIT between Australia and Papua New Guinea*; *BIT between Australia and Turkey*.
[216]*BIT between Australia and Argentina,* art 3.
[217]*BIT between Australia and Hong Kong*; *BIT between Australia and Romania*.
[218]*BIT between Australia and Czech Republic,* art 5.

Such the standard of treatment is contained in all BITs and FTAs with Australia. For foreign investors, it is one of the most important rights as they wish to freely transfer profits from their investment made abroad to their home state.

All BITs and FTAs then contain a non-exhaustive list of types of transfers which are guaranteed. Most BITs then stipulate that the transfer of funds subject to the law of the home state. Also, most BITs provide the right of the contracting parties to protect the rights of creditors or the satisfaction of judgement in relation to the transfer rights. Some BITs also specify in which circumstances the transfer of funds can be further limited.

Unlike BITs, all FTAs then stipulate in which other circumstances the transfer of funds can be delayed or prevented and list more situations than BITs in which such the transfer can be restricted. They all also provide that such restriction in a given situation must be under equitable, non-discriminatory and good faith application. For example, in ANZCERTA the standard of free transfer of investment and returns reads as follows:

> 1. Each Party shall permit all transfers into and out of its territory relating to a covered investment to be made freely and without delay in a freely usable currency at the market rate of exchange at the time of transfer. Such transfers include:
>
> (a) contributions to capital, including the initial contribution;
>
> (b) profits, dividends, interest, capital gains, royalty payments, management fees, and technical assistance and other fees;
>
> (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
>
> (d) payments made under a contract, including payments made pursuant to a loan agreement;
>
> (e) payments made pursuant to Articles 13 (Compensation for Losses) or 14 (Expropriation);
>
> (f) payments arising out of the settlement of a dispute; and
>
> (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.
>
> 2. Notwithstanding Paragraph 1, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, or derivatives;

(c) criminal or penal offences;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings; or

(f) social security, public retirement, or compulsory savings schemes.[219]

5.2.5 The Umbrella Clause

The umbrella clause is a provision in an investment protection treaty that guarantees the observation of obligations assumed by the host state to the investor.[220]Nonetheless, the scope of the umbrella clause was interpreted differently by tribunals. Depending on the wording of the umbrella clause, where the umbrella clause contains wording as: 'shall observe' in combination with 'any commitments/obligations' the tribunals interpreted the umbrella clause in the majority of cases in a wider sense, i.e. that it covers all obligations assumed/entered into by the contracting states, including contracts, unless stated otherwise.[221]

Australia concluded the umbrella clause in 4 BITs,[222]however, it did not include it in any FTA.

The wording in 3 BITs[223]is almost identical and provides as:

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[219]ANZCERTA, art 10.
[220]Dolzer and Schreuer, above n 3, 153.
[221]Katia Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' (Working Paper, OECD, March 2006) 22 <http://www.oecd-ilibrary.org/docserver/download/5l9hkssg1xxt.pdf?expires=1472756534&id=id&accname=guest&checksum=828CEB2C53630416B31BC6E10A2C72C0>.
[222]*BIT between Australia and China*; *BIT between Australia and Hong Kong*; *BIT between Australia and Papua New Guinea*; Agreement between the Government of Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, signed 7 May 1991, [1992] ATS 10 (entered into force 27 March 1992) ('*BIT between Australia and Poland*').
[223]*BIT between Australia and China*; *BIT between Australia and Papua New Guinea*; *BIT between Australia and Poland.*

'A Contracting Party shall, subject to its law, adhere to any written undertakings given by a competent authority to a national of the other Contracting Party with regard to an investment in accordance with its law and the provisions of this Agreement.'[224]

Different wording is provided in *BIT between Australia and Hong Kong* which reads:

'Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.'[225]

From the ordinary wording of the two above stated provisions, it can be assumed, as the first clause refers to the adherence of the written undertaking and the second stipulates the observance of the obligations entered into that they are wide and specific enough to include also contracts between an investor and a contracting state.

5.2.6 Compensation in the Event of War or Strife

All BITs and all FTAs, except CHAFTA, concluded by Australia contain the standard of treatment regarding compensation in the event of war or other forms of armed conflict, state emergency, revolution or similar situations. In their simple form these clauses provide for national treatment and MFN in relation to any measures such as restitution or compensation that states may take.[226]

A typical provision in BITs and FTAs stipulates as follows:

> Nationals of a Contracting Party, whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, insurrection, revolt, or other similar events, shall be accorded treatment by the other Contracting Party no less favourable than that accorded to nationals of any third country, should it adopt any measures relating to such losses.[227]

However, clauses of this type do not create substantive rights to restitution or compensation beyond non-discrimination *vis-à-vis* host state nationals or nationals of

[224] *BIT between Australia and China,* art 11.
[225] *BIT between Australia and Hong Kong,* art 2(2).
[226] Christoph Schreuer, 'The protection of investments in armed conflict' in Freya Beatens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press, 2013) 3, 11-12.
[227] *BIT between Australia and China,* art 9.

third countries. In other words, their effect depends on measures taken by the host State in relation to these investors.[228]

The majority of BITs and FTAs provide in relation to the above specified measures by the host state national treatment only. Five BITs [229]and 4 FTAs,[230]however, guarantee in addition to national treatment in relation to those measures also MFN treatment.

BITs and FTAs which does not provide the extended war and strife provision as discussed further below embodied the similar provision as stated above concerning compensation in the event of war and strife.

The extended war and strife clause, in addition to simple clauses as referred above, contains an absolute standard. Under this clause losses suffered by investors at the hand of the host State's forces or authorities through requisitioning or destruction not required by the necessities of the situation are treated in analogy to expropriation. In other words, such acts require compensation that is prompt, adequate and effective.[231]

Such an extended clause is contained in *BIT between Australia and Hong Kong* and in 5 FTAs.[232]However, *BIT between Australia and Hong Kong*, as in contrary to FTAs with the extended clause, stipulates only national treatment.

A such typical extended clause reads as follows:

[…] each Party shall accord to investors of the other Party and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife, treatment no less favourable than that it accords, in like circumstances, to:

(a) its own investors and their investments; and

(b) investors of any non-Party and their investments.

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[228]Schreuer, above n 227, 12.

[229]*BIT between Australia and Argentina; BIT between Australia and India; BIT between Australia and Mexico; BIT between Australia and Turkey*; *Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments, and Protocol*, signed 7 December 1995, [1997] ATS 8 (entered into force 2 February 1997) (‘*BIT between Australia and Peru’*).

[230]SAFTA; AANZFTA; MAFTA; JAEPA.

[231]Schreuer, above n 227, 12.

[232]ANZCERTA; AUSFTA; ACIFTA; KAFTA; TPP.

2. Notwithstanding Paragraph 1, if an investor of a Party suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the other Party's forces or authorities; or

(b) destruction of its covered investment or part thereof by the other Party's forces or authorities, which was not required by the necessity of the situation,

the other Party shall provide the investor with restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective […].[233]

5.2.7 Preservation of Rights

The preservation of rights clause reflects the general rule that the object and purpose of investment agreements is to improve the investment climate and not to derogate from such rights of the investor that are granted in other treaties.[234]

All BITs with Australia, excepting *BIT between Australia and Mexico* and *BIT between Australia and Papua New Guinea,* contain the preservation of rights clause. Only 4 FTAs[235]with Australia stipulate such a right. In FATA such the right is stipulated in the investment chapter, whereas in other FTAs, the right is stipulated in their first chapters governing general provisions.

A typical preservation of rights clause provides as follows:

'This Agreement shall not prevent an investor of one Contracting Party from taking advantage of the provisions of any law or policy of the other Contracting Party which are more favourable than the provisions of this Agreement.'[236]

5.3 Conclusion

It can be seen, that investment treaties entered into by Australia contain different substantive standards. Also, the wording of these standards differs. Only one standard, free transfer of investment and returns, is provided in all investment treaties with Australia. Some standards are provided only in BITs and not in FTAs, namely: entry and

[233]ANZCERTA, art 13.
[234]Dolzer and Schreuer, above n 3, 172.
[235]TAFTA; KAFTA; JAEPA; TPP.
[236]*BIT between Australia and Czech Republic,* art 3(4).

sojourn of personnel, non-impairment by arbitrary or discriminatory measures and the umbrella clause. In contrary, the minimum standard of treatment is not provided in any BITs, but is present in almost all FTAs.

FTAs in comparison to BITs, provide more detailed provisions in relation to standards of treatment and clarify some issues which otherwise might be doubtful as, for example, they limit the scope of FET and full protection and security to the minimum standard of treatment and clarify these two provisions in more detail.

The scope of rights in some standards is not clear and requires extensive scrutiny by tribunals. The standards which shed light of uncertainty are primarily the minimum standard of treatment, FET and non-impairment by arbitrary or discriminatory measures. Unlike these standards, content of some standards is straight-forward as, for example, entry and sojourn of personnel, free transfer of investment and returns and preservation of rights.

Regarding standards of treatment, there are two types of these standards. Those which provide absolute rights and those which provide relative rights and application of which depends on comparison with other investors and investment. These relative standards are national treatment, MFN treatment and compensation in the event of war or strife in its simple version.

In general, application of all standards depends on the wording of a relevant investment treaty and facts of a particular case.

6. Conclusion

Foreign investment is crucial for the economy development of each state. It brings benefits both to domestic states and to foreign investors. There are many factors which may influence investors' decision on investing in a particular state. Before making an investment in any particular country, investors should get familiar with the law governing foreign investment and its regulation to avoid possible fines from the side of the host state and at the same time to protect their investment against the host state's misconduct.

Many states try to attract more investments from abroad by concluding investment treaties, most often in the form of BITs. The main object of investment treaties is to promote and protect foreign investment. Investors can rely on protection and rights

established in such a treaty when both they and the investment controlled by them fall into the scope of a treaty. Otherwise, they would have to rely on protection under the law of the host state.

All investment treaties concluded with Australia contain a broad definition of investment, where virtually every kind of asset can be covered in such a definition. However, some of those treaties limit their scope by adding a requirement that the investment must have characteristics of investment. To qualify as an investor under an investment treaty, an investor has to possess nationality of the Contracting state. Nationality of a natural person is in most cases easy to ascertain, however, in the case of nationality of a legal person, the determination of nationality is more complicated. Most of investment treaties with Australia stipulate as the criterion for the nationality determination of the legal person the test of incorporation and the test of incorporation in combination with the test of control.

Foreign investment law in Australia is governed both by international and domestic legislation. At the level of international law, BITs and investment chapters of FTAs are the most significant legal resources. Nevertheless, Australia was not as active in negotiation of BITs and FTAs as other developed countries. To date Australia has concluded just 21 BITs and 10 FTAs containing investment chapter, which are currently in force. Moreover, there is one additional concluded FTA which includes a chapter on investment, *Trans Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam,*[237]which is not yet in force. Australia is also a party to international agreements related to foreign investment. The most important treaties are ICSID and New York Conventions. However, without incorporation of international treaties into domestic law, investors cannot invoke rights provided in those treaties before domestic courts in Australia. Nonetheless, doctrine of legitimate expectation will apply in these cases. However, if an unincorporated treaty guarantees ISDS mechanism, investors can invoke rights embodied in investment treaties before international tribunals and incorporation of an investment treaty in this case is not legally relevant. Domestic legislation and especially that adopted by the Commonwealth

[237]signed 4 February 2016, [2016] ATNIF 2 (not yet in force).

Parliament is of importance, for example, for existence and validity of investment. In addition, domestic legislation governs admission and establishment of foreign investment and the most pivotal piece of legislation is *Foreign Acquisitions and Takeovers Act 1975* (Cth) which governs screening of foreign investment. Transparency is highly adhered by Australia and all legal resources and government's announcement are available to the public on the Internet. The most useful platform for such information is AustLII. In addition, Australia is a signatory to international documents supporting transparency and transparency requirements are embodied in all investment treaties with Australia.

It is an expression of state sovereignty to decide to what extent to open its economy to foreign investors and foreign investment and which conditions must be met by an investor for his investment to be admitted in the territory of the host state. An approach of states in this regard differs, some have stricter rule than other. Nonetheless, nowadays, no state can solely rely on its own resources and funds from their nationals and domestic companies, thus as a result every state needs foreign investment for its further development. In general, in Australia all investments which contribute to the economy development and are not against the national interest are welcomed. However, *Foreign Acquisitions and Takeovers Act 1975* (Cth) imposes requirements on foreign persons in the case when their investment proposal meets certain criteria stipulated in this act, they have to notify the Treasurer about their investment proposal. Otherwise the Treasurer given extensive powers under *Foreign Acquisitions and Takeovers Act 1975* (Cth) can pronounce the investment to be undone. Beside the Treasurer, there is FIRB which advises the Treasurer on investment proposals. All investments proposals are reviewed on a case-by-case basis to assure that an investment is not against the national interest. Nevertheless, the concept of the national interest is not defined in legislation. Thus, investors, even though that the Government provided guidelines, which the Government considers while reviewing investment proposals, are put in uncertainty considering assessment of their investment proposal by the Government. Nonetheless, as FIRB's annual reports show, it is rare that an investment proposal would be rejected, however, it is common that further requirements are imposed on an investment proposal. The absence of the definition of the national interest, however, provides the Government with flexibility in terms of reviewal of investment proposals and its adaption to current Government's needs.

The main purpose of investment treaties is to promote and protect foreign investments. Substantive standards embodied in those treaties guarantee investors protection of rights from the side of the host state and their breach can lead to bringing a claim against the host state by an investor before a domestic court or in the case of investment arbitration against an international tribunal. As in the case of other clauses in investment treaties, states are free to opt which standards they wish to accord to investment and investors of the other contracting party in an investment treaty. Also, interpretation of these provisions should be interpreted like any other clauses in investment treaties and in accordance with *Vienna Convention on the Law of Treaties*.[238]Different standards are provided in BITs and FTAs with Australia. Also the wording of these standards differs. FTAs often provide the more detailed wording and clarification in relation to substantive standard clauses as opposed to BITs. As a result, the wording of some standards contained in BITs with Australia is doubtful and will depend on the tribunal's interpretation of a particular treaty and facts of each case to ascertain the scope of the standard. Standards with ambiguous content are, for example, the minimum standard of treatment, FET and non-impairment by arbitrary or discriminatory measures. In contrary, content of some standards is quite straightforward, these standards are, for instance, entry and sojourn of personnel, free transfer of investment and returns and preservation of rights. Regarding standards of treatment, they can be divided into two groups: absolute and relative standards of treatment. Where application of relative standards of treatment depends on comparison with other investors and investments. Relative standards of treatment are national treatment, MFN treatment and compensation in the event of war or strife in its simple version.

To conclude, it can be agreed that an investment environment in Australia is appealing, liberal, transparent and with low political and legal risk for foreign investors. Legal framework, including Investment Policy and other Government's regulation, announcements and decisions are easily accessible on the Internet, which increases legal certainty and transparency for foreign investors. Moreover, admission and establishment procedure of foreign investment in Australia is mostly clear. Legal uncertainty which investors can encounter is when their investment proposal is reviewed by the Treasurer

[238]opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

against the national interest test as there is no definition or consensus on the national interest term. Nonetheless, given the low rate of refusals of investment proposals, this test has not discouraged foreign investors from investing in Australia and Australia remains to be one of the most attractive place for foreign investment in the world.

Schedule 1
List of Bilateral Investment Treaties Concluded by Australia

Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol, signed 23 August 1995, [1997] ATS 4 (entered into force 11 January 1997)

Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments, signed 11 July 1988, [1988] ATS 14 (entered into force 11 July 1988)

Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments, signed 30 September 1993, [1994] ATS 18 (entered into force 29 June 1994)

Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments, signed 3 May 2001, [2002] ATS 19 (entered into force 5 September 2002)

Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993)

Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments, signed 15 August 1991, [1992] ATS 19 (entered into force 10 May 1992)

Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, signed 26 February 1999, [2000] ATS 14 (entered into force 4 May 2000)

Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments, signed 17 November 1992, [1993] ATS 19 (entered into force 29 July 1993)

Agreement between Australia and the Lao People's Democratic Republic on the Reciprocal Promotion and Protection of Investments, signed 6 April 1994, [1995] ATS 9 (entered into force 8 April 1995)

Agreement between the Government of Australia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments, signed 24 November 1998, [2002] ATS 7 (entered into force 10 May 2002)

Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, and Protocol, signed 23 August 2005, [2007] ATS 20 (entered into force 21 July 2007)

Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments, signed 7 February 1998, [1998] ATS 23 (entered into force 14 October 1998)

Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments, signed 3 September 1990, [1991] ATS 38 (entered into force 20 October 1991)

Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments, and Protocol, signed 7 December 1995, [1997] ATS 8 (entered into force 2 February 1997)

Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments, and Protocol, signed 8 December 1995, [1995] ATS 28 (entered into force 8 December 1995)

Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, signed 7 May 1991, [1992] ATS 10 (entered into force 27 March 1992)

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Agreement between Australia and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, signed 16 June 2005, [2010] ATS 8 (entered into force 29 June 2009)

Agreement between Australia and Uruguay on the Promotion and Protection of Investments, signed 3 September 2001, [2003] ATS 10 (entered into force 12 December 2002)

Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments, signed 5 March 1991, [1991] ATS 36 (entered into force 11 September 1991)

Schedule 2
List of Free Trade Agreements Concluded by Australia

Agreement between Australia and Japan for an Economic Partnership, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015)

Agreement Establishing the Asean-Australia-New Zealand Free Trade Area, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010)

Australia – Chile Free Trade Agreement, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009)

Australia-Thailand Free Trade Agreement, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005)

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Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement, signed 16 February 2011, [2013] ATS 10 (entered into force 1 March 2013)

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Abstract in English

The purpose of this master's thesis is to introduce a reader into some legal aspects of foreign investment in Australia. And especially those which can be crucial for a foreign investor when contemplating about investing in Australia.

The thesis is divided into 6 chapters. The first chapter introduces the topic of foreign investment and the thesis itself. The second chapter familiarizes with the key terms in international investment law, namely, investor (both a natural and legal person) and investment (in economic and legal sense). The third chapter describes the legal framework governing foreign investment in Australia. It provides an overview of domestic and also international legislation. The fourth chapter then deals with admission and establishment of investment in Australia. It covers how this issue is regulated in investment treaties and in domestic legislation, where the most important piece of legislation is Foreign Acquisitions and Takeovers Act. Further, this chapter describes the concept of foreign person and the national interest test. The concept of the national interest test is important as all foreign investments which are notifiable actions are assessed by the Treasurer against the national interest test, which, however, is not defined in legislation. The fifth chapter analyses some the most common standards of treatment and other substantive standards embodied in BITs and FTAs with Australia, namely, these standards of treatment: the international minimum standard of treatment, national and MFN treatment, fair and equitable treatment and full protection and security. And further the following substantive standards: protection from expropriation without compensation, non-impairment by arbitrary or discriminatory measures, entry and sojourn of personnel, free transfer of investment and returns, the umbrella clause, compensation in the event of war and strife and preservation of rights. The final chapter then summarizes the findings from the thesis.

Abstrakt v českém jazyce

Cílem této diplomové práce je představit čtenáři některé právní aspekty zahraničních investic v Austrálii. Zvláště pak ty, které mohou být pro zahraničního investora klíčové při jeho rozhodování o investování v Austrálii.

Práce je rozdělena do 6-ti kapitol. První kapitola představuje téma zahraničních investic a diplomovou práci samu. Druhá kapitola seznamuje s klíčovými pojmy v mezinárodním investičním právu, a to s pojmem investora (fyzickou a právnickou osobu) a pojmem investice (v ekonomickém a právním smyslu). Třetí kapitola popisuje právní rámec upravující problematiku zahraničních investic v Austrálii. Kapitola poskytuje přehled jak domácí tak zahraniční legislativy. Čtvrtá kapitola se dále zabývá přijetím a zřizováním investice v Austrálii. Tato kapitola představuje úpravu této problematiky v investičních dohodách a domácí legislativě, kde nejdůležitějším právním předpisem je zákon o zahraničních akvizicích a převzetích. Dále, tato kapitola popisuje koncept zahraniční osoby a test národního zájmu. Test národního zájmu je důležitým pojmem, neboť všechny zahraničí investice, které jsou zároveň investicemi, které musí být notifikovány ministru financí Austrálie, jsou hodnoceny, zda splňují kritérium národního zájmu. Pojem národního zájmu nicméně není nikde právně definován. Pátá kapitola zkoumá některé nejčastější standardy zacházení s investicí a další hmotněprávní standardy obsažené v BID a DVO s Austrálii, a to následující standardy zacházení: mezinárodní minimální standard zacházení, doložku národního zacházení, doložku nejvyšších výhod, doložku spravedlivého a rovnoprávného zacházení a doložku plné ochrany a bezpečnosti. A dále následující hmotněprávní standardy: ochranu před vyvlastněním bez kompenzace, ochranu před svévolným a diskriminačním zacházením, garanci vstupu a pobytu osob, záruku volného převodu výnosů, umbrella clause, záruku odškodnění v případě konfliktu a války a doložku zachování práv. Poslední kapitola potom shrnuje poznatky diplomové práce.

Teze v českém jazyce

1 Úvod

Globální ekonomika se nevyznačuje pouze růstem mezinárodního obchodu, ale taktéž vzrůstajícím přílivem zahraničních investic. Zabezpečování zahraničních trhů pomocí služeb a zboží prostřednictvím zahraničních investic je svým významem srovnatelné s mezinárodním obchodem. Zahraniční investice jsou klíčovým faktorem pro ekonomický a sociální vývoj, nepřetržitý ekonomický růst, snižování chudoby, zlepšení infrastruktury a finanční stabilitu. Od poloviny osmdesátých let došlo k nárustu objemu zahraničních investic po celém světě. Faktory, jako globalizace, technologický rozvoj, liberalizace práva a dalších vládních praktik všechny přispěly k růstu přeshraničních investic.

Jedním z faktorů, které mohou ovlivnit investorovo rozhodování, zda investovat v dané ekonomice je, jak investor vnímá politické riziko v hostující zemi. Politické riziko může například představovat hrozbu vyvlastnění investice bez adekvátní kompenzace nebo opatření, které se mohou rovnat vyvlastnění. Nejdůležitějším právním pramenem v oblasti mezinárodního investičního práva, které toto riziko může zmírnit, jsou bilaterální investiční dohody (BID) a dále dohody obsahující kapitolu na ochranu a podporu investic jako například dohody o volném obchodu (DVO). Od sjednání první BID mezi Německem a Pakistánem v roce 1959 počet těchto dohod významně vzrostl a to k dnešnímu počtu více než 2 500 uzavřených BID. Nicméně, existence BID mezi určitými státy nezaručuje, že dojde rovněž k nárůstu počtu zahraničních investic mezi nimi. K příznivým podmínkám pro zahraniční investice patří právní rámec zaručující spolehlivou ochranu vlastnictví, nezávislý a efektivní systém soudnictví, právní jistota a přehledně stanovená pravidla pro vládní intervence a podnikatelské aktivity.

Austrálie patří mezi atraktivní destinace pro zahraniční investice. Od let 1990 – 1991 po dobu 24 let zaznamenávala Austrálie nepřetržitý ekonomický růst, úspěch, který se nepodařil jiné rozvinuté zemi světa. Její strategická lokace s blízkostí k Asii je využívána mnoha společnostmi jako „vstupní brána“ pro jejich expanzi a investice v oblasti Asie a Tichomoří. Dále Austrálie profituje z kvalifikovaných pracovníků, silné správy, spolehlivého a předvídatelného právního systému, dobré infrastruktury a nabízí přátelské podnikatelské prostředí pro investory. Pro podporu a příliv zahraničních investic do Austrálie byla taktéž založena Australská vládní agentura na podporu obchodu a investic („Austrade“), které rovněž pomáhá zahraničním společnostem se založením jejich obchodního zastoupení v Austrálii.

Austrálie je závislou na zahraničních investicích a z tohou důvodu jsou zahraniční investice Australskou vládou vítány a podporovány. Tento vztah závislosti Austrálie na investicích ze zahraničí je taktéž vyjádřen v současné zahraniční investiční politice Austrálie („Investiční politika“) a to následně:

„Zahraniční investice pomohly k ekonomickému rozvoji Austrálie a dále budou přispívat ke zvyšování blahobytu obyvatel Austrálie v budoucnu a to svým přispěním k ekonomickému růstu a inovacím. Bez těchto zahraničních investic výroba, zaměstnanost a příjem by byly nižší.“

2 Klíčové Pojmy

Tato kapitola rozebírá klíčové pojmy v oblasti práva zahraničních investic, pojem investice a investora. Tyto pojmy jsou klíčové zejména z toho důvodu, zda daná investice a investor spadají do působnosti dané mezinárodní investiční dohody („MID“) a následně mohou investorovi a jeho investici garantovat v nich obsažená práva.

2.1 Ekonomický Pojem Investice

Má se za to, že přímá zahraniční investice se vyznačuje (a) převodem finančních prostředků, (b) v rámci dlouhodobého projektu, (c) za účelem pravidelného zisku, (d) za účasti osob převádějící finanční prostředky alespoň v určité míře na vedení projektu a (e) obchodním rizikem. Aby byl splněn požadavek zahraničního prvku a tedy aby se jednalo o zahraniční investici, převod musí probíhat z jednoho státu do druhého za účelem užití v tomto státu.

Na základě mezinárodních standardů, například ty vypracované Organizací pro Hospodářskou Spolupráci a Rozvoj („OECD"), investice, aby mohla být kvalifikována jako přímá zahraniční investice a ne jako portfóliová, rezident jedné ekonomiky musí investovat v jiné ekonomice a držet minimálně 10% hlasovacích práv v cílovém podniku. Tato hranice 10% je taktéž akceptována vládou Austrálie jako určující prvek pro rozlišování přímých zahraničních investic od investic portfóliových.

Portfóliové zahraniční investice jsou takové, kde je diskurz mezi managementem a kontrolou společnosti a vlastnickým podílem v dané společnosti. Narozdíl od přímých zahraničních investic, portóliové zahraniční investice jsou představovány pohybem peněz za účelem nákupu akcií ve společnosti založené nebo operující v jiné zemi. Dále portfolióve investice oproti přímým zahraničním investicím nejsou chráněny obyčejovým mezinárodním právem, avšak tato ochrana může být zaručena MID.

2.2 Právní Pojem Investice

Právní pojem investice není jednotně chápaným pojmem, což umožňuje státům volnost při stanovení této definice v MID. Jednou ze smluv, která obsahuje pojem investice, avšak ho nikde nedefinuje, je *Úmluva o řešení sporů z investic mezi státy a občany druhých států* ("*Úmluva ICSID*"). Pojem investice je v této úmluvě klíčový, neboť tím vyhrazuje spory, které mohou být řešeny před Střediskem pro řešení sporů z investic ("ICSID"). Austrálie jako signatář této úmluvy zahrnula možnost předložení investičního sporu mezi investorem a státem před ICSID ve všech BID, kromě BID s Hong Kongem a dále rovněž v některých svých DVO.

Při určování definice investice většina tribunálů spoléhá na tzv. *Salini* test, stanoveného v nálezu *Salini v Marocco*, ve kterém byly stanoveny tyto náležitosti na investici: poskytnutí peněz či jiných aktiv, určité trvání, prvek rizika a přispění k ekonomickému rozvoji hostitelského státu. Požadavek pravidelnosti zisku a obratu však nebyl Tribunálem jako prvek značící investici v tomto rozhodnutí zmíněn. Tento pátý prvek byl však uveden v rozhodnutí *Fedax N.V. v. The Republic of Venezuela* a byl původně jako prvek značící investici prohlášen profesorem Schreuerem. Nicméně *Salini* test není tribunály striktně následován a podléhá jejich diskreci.

Ve vztahu k definici investice na základe MID, většina multilaterálních investičních dohod, investičních kapitol DVO a BID obsahují tzv. široký pojem investice. Tyto dohody většinou definují investici jako každou majetkovou hodnotu doplněnou obvykle o demonstrativní výčet možných aktiv, kterými může být investice představována. Dohody, které obsahují tento typ definice jsou Rubinsnem označovány jako „dohody s ilustrativním výčtem". Většina těchto dohod zahrnuje jak přímé, tak portfóliové investice. Tento typ definice investice je obsažen ve všech BID s Austrálií a rovněž ve většině DVO.

Nicméně, v MID se vyskytují další typy definic investice. Dalším tímto typem jsou dohody označovány Rubinsnem jako „dohody s taxativním výčtem". Tyto dohody obsahují taktéž široký pojem investice, avšak dále tento pojem limitují buď taxativním nebo negativním výčtem

možných forem investice. Žádná BID nebo DVO s Austrálií tento typ definice investice neobsahuje.

Poslední typ dohod je Rubinsnem označován jako „dohody s hybridním výčtem“. Tento typ dohod definuje taktéž investici obšírně a obsahuje demonstrativní výčet možných forem investice, avšak klade požadavek, že investice musí mít náležitosti investice jako přispění kapitálu, očekávatelnost zisku a převzetí rizika. Některé DVO s Austrálií obsahují tento typ definice.

2.3 Pojem Investora

Investorova státní příslušnost je rozhodujícím faktorem pro určení na základě které MID mu jsou poskytována práva a zajištěna ochrana. Investorem může být jak fyzická, tak právnická osoba a rovněž i entita kontrolována státem. Zahraniční příslušnost investora je určována v případě fyzických osob jeho státní příšlušností a v případě obchodních společností dle místa jejího založení, dále dle státu, kde má právnická osoba své sídlo nebo testem kontroly a to určením zahraniční příslušnosti vlastníka dané společnosti, který společnost ovládá.

Některé MID uzavřené Austrálií rozšiřují státní příslušnost pro účely ochrany té které MID taktéž pro osoby s trvalým pobytem na území Austrálie. Zákon, který se zabývá problematikou státního občanství a rezidentství v Austrálii je *Zákon o Australském občanství z roku 2007*.

Ohledně určení zahraniční příslušnosti společnosti, BID a DOV s Austrálií všechny obsahují kritérium státu místa založení společnosti. Některé další BID obsahují taktéž vedle kritéria místa založení společnosti i test kombinace kritéria místa založení s testem kontroly. Kritérium pro určení kontroly je potom ve většině BID stanoveno tím, zda subjekt má v dané společnosti významný podíl. Nicméně v BID není dále uvedena hranice pro stanovení tohoto podílu. Dále navíc BID mezi Austrálií a Mexikem obsahuje vedle požadavku místa založení taktéž požadavek skutečné ekonomické činnosti v daném státě pro získání zahraniční příslušnosti pro účely investiční dohody.

V oblasti mezinárodního práva je všeobecně uznáváno, že i akcionáři nezávisle na obchodní společnosti se mohou domáhat ochrany na zákadě MID. V BID a dále v některých DOV s Austrálií je vlastnictví akcií nebo účast ve společnosti zahrnuta v definici investice. Tímto je potom zaručena možnost akcionářů domáhat se ochrany přímo.

Možné problémy ve vztahu k výše uvedeným kritérium určování zahraniční příslušnosti investora jsou takové, že společnosti mohou jednoduše pozměnit svoji korporátní strukturu za účelem využití ochrany některé MID. Tento proces restrukturalizace za účelem využití ochrany na základě některé BID je známy jako „treaty shopping“. Příkladem, kdy společnost takto pozměnila svoji strukturu převodem akcií v rámci holdingu za účlem využití ochrany na základě BID byl nedávný případ *Philip Morris Asia Limited v The Commonwealth of Australia,* kde Philip Morris chtěl využít ochrany na základě BID mezi Austrálií a Hong Kongem. Avšak tato restrukturalizace v rámci holdingu proběhla již v době, kdy bylo pravděpodobné, že se Philip Morris bude domáhat ochrany a proto tribunál odmítnul svoji příslušnost s tím, že šlo o zneužití práva ze strany žalobce. Případ *Philip Morris Asia Limited v The Commonwealth of Australia* je taktéž prvním a jediným případem investičního sporu podaným investorem vůči Austrálii. Následně Australská vláda ze strachu, že by další takovéto investiční spory mohly být vzneseny vůči Austrálii i v budoucnu, změnila svůj přístup k sjednávání mechanismu pro řešení sporů mezi investorem a státem (tzv. „ISDS“) v MID a nyní sjednává ISDS v MID individuálně případ od případu. Avšak všechny BID s Austráliii a taktéž většina DVO obsahují ISDS.

3 Právní Rámec Upravující Zahraniční Investice

Investiční právo je tvořeno jak právem vnitrostátním, tak právem mezinárodním a to především multilatrálními a bilaterálními smluvami na ochranu a podporu investic, dále úmluvami obsahující kapitolu na ochranu investic a taktéž úmluvami, které se jinak dotýkají investic. Investiční právo je taktéž dále tvořeno mezinárodním právem obyčejovým a dalšími právními principy.

3.1 Vnitrostátní Právo

Australské vnitrostátní právo, vedle dalších aspektů zahraničních investic, je rozhodující pro určení existenci investice. Ke vztahu vnitrostátního a mezinárodního investičního práva Douglas poznamenal následující: "Investiční spory jsou spory z investic, investice se týkají vlastnictví a vlastnictví se týká specifických vlastnických práv, které jsou upraveny právem vnitrostátním".

Takže, zda dané aktivum držené na území smluvní strany investiční smlouvy je investicí chráněnou příslušnou smlouvou je záležitostí té které investiční smlouvy a nikoli otázkou vnitrostátního práva. Avšak, aby určité aktivum mohlo být považováno za investici spadající pod příslušnou investiční úmluvu, dané aktivum musí nejdříve právně existovat a takováto existence je otázkou vnitrostátního práva státu ve kterém je aktivum drženo.

V Austrálii jsou tato vlastnická a smluvní práva upravena legislativou tvořenou celostátním parlamentem ("Commonwealth parlament") a dále parlamenty jednotlivých států či teritorií, lokálními vládami a právem soudcovským ("právo common law").

Mimo dalšího, vnitrostátní právo je taktéž důležité pro platnost investice a dále ve vztahu k požadavkům uloženým investorovi na realizaci investice.

Protože Austrálie je dualistický stát, všechny mezinárodní smlouvy, tedy i včetně těch investičních, musí být nejdříve inkorporovány do vnitrostátního práva, aby práva a povinnosti v nich obsažená nabyla účinků. Inkorporace mezinárodních smluv je záležitostí Commonwealth parlamentu. Mezinárodní smlouvy se stanou součástí práva vnitrostátního pouze v té míře v jaké byly výslovně inkorporovány danou legislativou.

Nicméně, mezinárodní právo může mít významný vlív na vnitrostátní právo Austrálie. Například pro výklad vnitrostátních zákonů, v rozsudku *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs*, Nejvyšší soud Austrálie potvrdil výrok, že soudy mají, v případě nejasnosti zákonů přijatých Commonwealth parlamentem, daný zákon interpretovat v duchu té které mezinárodní smlouvy ke které se Austrálie zavázala.

I když příslušná investiční smouva nebyla Commonwealth parlamentem inkorporována do vnitrostátního práva, investor se stále může před vnitrostátními soudy domohát práva legitimního očekávání. V případě, že daná investiční smlouva obsahuje ISDS a tedy investor může přímo žalovat hostitelský stát před mezinárodním tribunálem, tribunál v tomto případě bude přímo aplikovat příslušnou investiční smlouvu a případná neinkorporace dané mezinárodní smlouvy do vnitrostátního práva není právně relevantní. Tato premisa vyplývá z principu, že mezinárodní smlouvy jsou "smlouvy" ve smyslu článku 2(1)(a) *Vídeňské úmluvy o smluvním právu* a tak řízeny právem mezinárodním. Taktéž Tribunál v rozhodnutí *MTD v Chile* potvrdil, že Tribunál je na základě BID nucen aplikovat mezinárodní právo.

Monitorování zahraničních investic v Austrálii je upraveno několika zákony a jimi korespondujícími nařízeními a dále doplněno o Investiční politiku. Zákonná úprava regulující

zahraniční investice zahrnuje následující zákony: *Zákon o zahraničních akvizicích a převzetích z roku 1975* ("FATA"), který upravuje monitoring zahraničních investic, *Zákon o poplatcích uvalených na zahraniční akvizice a převzetí z roku 2015*, který upravuje notifikační poplatky zahraničních investic, *Zákon o registru zahraničního vlastnictví zemědělské půdy*, který upravuje registraci vlastnictví zemědělských pozemků zahraniční osobou. Investiční politika potom specifikuje přístup vlády při aplikaci FATA.

Dále v oblasti citlivých sektorů ekonomiky jako bankovnictví, letectví a telekomunikace existuje další zákonná úprava, která stanovuje další požadavky pro zahraniční investory v těchto oblastech.

Transparentnost je jedním ze zásadních faktorů pro zahraniční investory při investování v hostující zemi. Ne-existence transparentnosti přináší další náklady pro investory kvůli nedostatku informací ohledně budoucích vládních aktivit a záměrů a v případě přeshraničních fůzí a akvizic může taktéž zpomalit process celé transakce.

Austrálie vyjádřila svůj závazek k dodržování transparentnosti a zavázala se k dodržování transparentnosti v rámci Organizace pro hospodářskou spolupráci a rozvoj ("OECD") svým přistoupením k *Deklaraci o mezinárodních investicích a nadnárodních podnicích*. Dále všechny MID uzavřené Austrálií obsahují povinnost zavazující strany k transparentnosti při aplikaci práva.

Veškeré prameny práva jak legislativní, tak soudní jsou volně přístupny veřejnosti zdarma prostřednictvím Australsko-Asijského Informačního Právního Institutu ("AustLII"). Účelem AustLII jako platformy podporované vládou je zlepšit přístup k právu prostřednictvím zjednodušeného přístupu k právním informacím. Dále je zřízena databáze mezinárodních smluv, která poskytuje přístup k mezinárodním smlouvám k nimž je Austrálie smluvní stranou. Dále ve vztahu k monitoringu mezinárodních investic, Výbor pro monitoring zahraničních investic ("FIRB"), což je neveřejnoprávní orgán pověřen poradenstvím pro ministra financí a vládu v oblasti Investiční politiky a jejího výkonu, uveřejňuje na svých internetových stránkách informace o svém přístupu při monitoringu zahraničních investic, dále zpřístupňuje znění související legislativy a taktéž potřebné formuláře pro zahraniční investory. Dále internetové stránky ministra financí poskytují přístup k nedávným investičním rozhodnutím a dalším dokumentům souvisejících se zahraničními investicemi.

3.2 Mezinárodní Právo

Hlavním pramenem mezinárodního investičního práva jsou MID doplněné dále o všeobecné principy práva mezinárodního, včetně mezinárodního obyčeje a dalších mezinárodních smluv, které se týkají investic.

I přes to, že došlo k významnému nárustu MID, do dnešní doby nedošlo ke sjednání úmluvy mezi státy, která by komplexně upravovala zahraniční investice. Narozdíl od mezinárodního obchodu, kde takovéto komplexní úmluvy mezi státy existují. Jedním z nedávných pokusů o sjednání takovéto úmluvy v oblasti zahraničních investic byla *Multilaterální Dohoda o Investicích* na úrovni OECD. V rámci Světové Hospodářské Organizace ("WTO"), tři úmluvy tzv. Dohody Urugajského kola obsahjí ustanovení týkající se zahraničních investic, jmenovitě *Dohoda o obchodních aspektech práv k duševnímu vlastnictví* ("TRIPS"), *Všeobecná dohoda o obchodu se službami* ("GATS") a *Dohoda o obchodních aspektech investičních opatření* ("TRIMS"). Tyto dohody nabyly účinnosti pro Austráli 1. ledna 1995. Nicméně, tyto smlouvy se zabývají zahraničními investicemi pouze útržkovitě. TRIPS se zabývá standardy ochrany průmyslových práv. GATS upravuje zahraniční investice v oblasti služeb. TRIMS potom zakazuje státům zavádění investičních opatření, které jsou v rozporu se zásadou národního

zacházení upraveného v článku III *Všeobecné dohody o clech a obchodu* ("GATT") a kvót dle článku XI GATT.

Pod záštitou Světové banky došlo k založení dvou organizací, jejichž účelem je podpora zahraničních investic a to ICSID a Mnohostranné agentury pro investiční záruky ("MIGA"). ICSID je nezávislá a depolitizovaná instituce zasvěcená k rozhodování mezinárodních investičních sporů mezi investory a státy. ICSID je sjednána jako instituce pro řešení sporů v mnoha MID a individuálních investičních dohodách uzavíraných mezi investorem a státem. ICSID byla založena v roce 1966 na základě *Úmluvy ICSID*, která byla doposud ratifikována 153 státy a pro Austrálii nabyla účinnosti 1. června 1991. Všechny DVO a BID, které obsahují ISDS s výjimkou BID mezi Austrálií a Hong Kongem umožňují investorům vznést svůj nárok před ICSID.

MIGA poskytuje investorům pojištění proti politickému riziku a podporuje příliv přímých investic do rozvojových zemí. MIGA byla založena v roce 1988 *Úmluvou o mnohostranné agentuře pro investiční záruky* ("*Úmluva MIGA*"). Tato úmluva nabyla účinnosti pro Austráli 16. prosince 1998. V současné době je 181 zemí členem MIGA, z čehož 156 zemí jsou rozvojové státy a 25 jsou rozvinuté země, včetně Austrálie.

Konečně, dokument, který je významným pro arbitráž mezi investorem a státem je *Newyorská úmluva o uznávání a výkonu cizích rozhodčích nálezů* ("*Newyorská Úmluva*"), která stanovuje pravidla pro uznávání a výkon cizích rozhodčích nálezů a to včetně těch investičních. *Newyorská Úmluva* byla Austrálií ratifikována 26. března 1975.

BID a investiční kapitoly DVO jsou dalším důležitým zdrojem investčiního práva protože zaručují ochranu zahraničním investorům. Austrálie, ve srovnání s dalšími vyspělými zeměmi však nebyla příliš aktivní ve sjednávání těchto smluv. Austrálie je stranou k 21 BID a 10 DVO obsahujících kapitolu o ochraně a podpoře investic, které jsou nyní v účinnosti. Dále Austrálie je stranou již sjednané *Dohody o transpacifickém partnerství,* která však ještě není účinná. Dále 5 DVO, které s velkou pravděpodobností budou obsahovat investiční ustanovení jsou nyní v jednání.

4 Přijetí a Zřizování Investice

4.1 Mezinárodní Úprava

Na základě mezinárodního obyčejového prává žádný stát není povinnen přijmout na svém území zahraniční investici a to buď celkově nebo v určitém odvětví. Privilegiem každého státu je, jak otevře svou ekonomiku zahraničním investicím a jaké další požadavky bude mít pro přijetí či zřizení investice. Nicméně po přijetí investice je každý stát povinnen zacházet s investicí v souladu se svým právním řádem a mezinárodním minimálním standardem zacházení.

Je nutné rozlišovat mezi přijetím a zřizováním zahraniční investice. Kde přijetí upravuje právo vstupu zahraniční investice, kdežto zřizování dále představuje podmínky na základě kterých je investor oprávněn s investicí nakládat a dále právo zřídit zastoupení v hostitelském státě.

Většina mezinárodních investičních dohod většinou neobsahuje závazky ve vztahu k přijetí či zřizování investice. V investičních dohodách se vyskytují dva modely týkající se přijetí a zřizování investice a to předvstupový a povstupový režim. Hlavní rozdíl je v tom, zda doložka národního zacházení a doložka nejvyšších výhod je zaručena ve stádiu přijetí a zřizování investice. Všechny BID uzavřené Austrálií následují povstupový režim a negarantují právo příjmutí a zřízení investice. Na druhou stranu, všechny DVO s Austrálií následují předvstupový

režim a všechny zaručují národní zacházení a některé taktéž zacházení dle doložky nejvyšších výhod pro přijetí a zřízení investice. Avšak tyto DVO dále obsahují přílohu s výčtem ve kterých sektorech a dalších případech se tato aplikace neuplatní.

4.2 Vnitrostátní Úprava

Monitoring zahraničních investic v Austrálii je upraven ve FATA. Tento zákon upravuje nabývání vlastnictví cenných papírů, nemovitostí, společností, trustů a dalších aktiv, které mají spojitost s Austrálií.

Proces na základě FATA je řízen Australským ministrem financí, jímž v současné době je Scott Morrison a dále FIRB, který posuzuje investiční návrhy zahraničních investorů a činí doporučení pro ministra financí.

Zákon FATA používá tyto klíčové pojmy: významná a ohlašovatelná akce a dále zahraniční osoba. Transakce, které jsou označovány jako ohlašovatelné musí být oznámeny ministru financí před tím než jsou uskutečněny. Narozdíl od ohlašovatelných transakcí, významná transakce nemusí být ohlášena před jejím uskutečněním. Nicméně, ministr financí může na takovouto transakci uvalit další podmínky pro její realizaci. FATA upravuje investiční záměry podávané pouze zahraničními osobami a takovouto osobou může být fyzická osoba, která není rezidentem Austrálie, zahraniční vláda dále obchodní společnost či správce trustu, kde je většinový podíl v této společnosti či trustu držen buď nerezidentem Austrálie nebo zahraniční obchodní společností či zahraniční vládou.

Dalším důležitým pojmem, který je posuzován při hodnocení investičních záměrů je národní zájem. I když jsou zahraniční investice Australskou vládou vítány, investiční záměry jsou hodnoceny zhlediska toho, zda nejsou v rozporu s národním zájmem. Ministr financí může takovýto záměr, který by byl v rozporu s národním zájmem zakázat. Avšak, co je míněno národním zájmem není nikde legislativně definováno a je posuzováno případ od případu. To, že neexistuje legislativní definice národního zájmu má svá opodstatnění a umožňuje vládě flexibilitu při rozhodování. Test národního zájmu byl taktéž předmětem kritky řady komentátorů, kteří, mimo jiného, kritizovali, že neurčitost národního zájmu může vést k významnému odlivu zahraničních investic. Avšak, jak ukazují vládní statistiky, v praxi příliš nedochází k zamítnutí investičních záměrů z důvodů nesouladu s národním zájmem.

5 Standardy Zacházení a Další Hmotněprávní Standardy v BID a DVO s Austrálií

5.1 Standardy Zacházení

Nejčastějšími standardy zacházení obsaženými v mezinárodních investičních smlouvách a to i v těch uzavřených Austrálií jsou mezinárodní minimální standard zacházení, doložka národního zacházení, doložka nejvyšších výhod, doložka spravedlivého a rovnoprávného zacházení a doložka plné ochrany a bezpečnosti.

Doložka národního zacházení a doložka nejvyšších výhod jsou tzv. relativní standardy zacházení a jako takové negarantují žádná hmotněprávní práva. Jejich aplikace závisí na srovnání se zacházením s jinými investory a investicemi.

5.1.1 Mezinárodní Minimální Standard Zacházení

Mezinárodní minimální standard není obsažen v žádné BID s Austrálií. Nicméně všechny DVO s výjimkou DVO s Thajskem, Novým Zélandem a Čínou obsahují ustanovení upravující tento standard. Znění mezinárodního minimálního standardu je téměř totožné ve všech DVO a jeho aplikace v těchto DVO je omezena rozsahem, jakým je zaručena ochrana dle mezinárodního obyčejového práva a tudíž negarantuje žádná další práva nad tento rozsah.

5.1.2 Doložka Národního Zacházení

Tento standard zacházení je obsažen ve 4 BID a ve všech DVO s Austrálií. Nicméně znění tohoto standardu v daných smlouvách se liší. Všechny BID zaručují tento standard zacházení až po zřízení investice a garantují toto právo pouze investicím a nikoli investorům. Na druhou stranu, všechny DVO zaručují národní zacházení již ve fázi zřizování investice a udělují ji jak investicím, tak investorům. Nicméně, všechny DVO potom obsahují výjimky ve kterých se tato doložka neuplatní.

5.1.3 Doložka Nejvyšších Výhod

Doložka nejvyšších výhod je obsažena ve všech BID a všech DVO s Austrálií, s výjimkou DVO se Singapurem a Novým Zélandem. Pouze 4 BID garantují doložku nejvyšších výhod jak pro investice, tak pro investory. Žádná BID však negarantuje tuto doložku nejvyšších výhod ve fázi zřizování. Všechny DVO na druhou stranu zaručují toto právo pro investice i investory a to i ve fázi zřizování investice.

5.1.4 Doložka Spravedlivého a Rovnoprávného Zacházení

Tento standard zacházení je obsažen ve všech BID a taktéž ve všech DVO s Austrálií s výjimkou DVO s Čínou. Nicméně znění této doložky v BID a DVO se liší. Téměř ve všech DVO je tento standard upraven společně s doložkou plné ochrany a bezpečnosti a to v ustanovení upravující mezinárodní minimální standard. Dále ve všech DVO s výjimkou DVO s Thajskem je dále upraveno, že doložka spravedlivého a rovnoprávnhého zacházení nevyžaduje zacházení nad to, keré je vyžadována na základě mezinárodního práva a negarantuje další hmotněprávní práva.

5.1.5 Doložka Plné Ochrany a Bezpečnosti

Doložka plné ochrany a bezpečnosti je obsažena ve všech BID s Austrálií s výjimkou BID s Filipínami. Tato doložka je taktéž obsažena ve všech DVO s Austrálií s výjimkou DVO s Čínou. Jak v případě doložky spravedlivého a rovnoprávného zacházení, tak i v případě této doložky DVO vymezují, že ochrana na základě této doložky koresponduje s ochranou na základě mezinárodního obyčejového práva. Dále je ve všech DVO vymezeno, že tato ochrana je zaručena ve formě fyzické a nikoli právní ochrany. V BID není doložka plné ochrany a bezpečnosti výslovně omezena pouze na fyzickou ochrana. Zda na základě BID má být vedle fyzické ochrany taktéž zaručena i ochrana právní, bude záviset na interpretaci té které smlouvy příslušným tribunálem a na okolnostech daného případu.

5. 2 Další Hmotněprávní Standardy

Dalšími častými hmotněprávními standardy v investičních smlouvách jsou následují standardy: ochrana před vyvlastněním bez kompenzace, ochrana před svévolným a diskriminačním zacházením, garance vstupu a pobytu osob, záruka volného převodu výnosů, umbrella clause, záruka odškodnění v případě konfliktu a války a doložka zachování práv.

5.2.1 Ochrana před Vyvlastněním bez Kompenzace

Tento standard je obsažen ve všech BID a taktéž ve všech DVO uzavřených Austrálií s výjimkou DVO s Čínou. Znění tohoto standardu v BID a DVO se však liší. V případě BID ustanovení upravující tento standard upravuje pouze náležitosti dle kterých je vyvlastnění legální a dále podmínky pro odškodnění investora. Další aspekty vyvlastnění jsou nechány vnitrostátní úpravě. DVO upravují tento standard detailněji a některé z nich obsahují i přílohu, která vymezuje případy, které nezakládají vyvlastnění.

Ve vztahu k odškodnění, všechny BID a DVO stanovují plné odškodnění za investici investorovi a jeho výše je určena na základě spravedlivé hodnoty investice na trhu.

5.2.2 Ochrana před Svévolným a Diskriminačním Zacházením

Tento standard je obsažen v 5 BID a není přítomen v žádné DVO s Austrálií. V arbitrážní praxi tento standard bývá zřídka napadád jako primární nebo hlavní standard porušení práva investora státem ve sporu.

5.2.3 Garance Vstupu a Pobytu Osob

Tento standard je zaručen ve všech BID s Austrálií, ale naopak není garantován v žádné DVO ve vztahu k investicím.

5.2.4 Záruka Volného Převodu Výnosů

Záruka volného převodu výnosů je zaručena ve všech BID a DVO s Austrálií. Pro zahraniční investory je tento standard jedním z nejdůležitějších práv, protože jim umožňuje bez omezení převést zisk ze zahraniční investice zpět do svého domovského státu.

5.2.5 Umbrella Clause

Tato klauzule je obsažena ve 4 BID s Austrálií. Žádná DVO s Austrálií tuto klauzuli neobsahuje. Rozsah tohoto standardu byl interpretován tribunály odlišně, takže jeho aplikace bude záležet na faktech daného případu a na konkrétním znění dané BID. Nicméně, dle znění této doložky v BID s Austrálií se zdá být pravděpodobné, že tato doložka bude zaručovat ochranu taktéž smlouvám uzavřeným mezi investory a státem.

5.2.6 Záruka Odškodnění v Případě Konfliktu a Války

Tento standard je obsažen ve všech BID a taktéž ve všech DVO uzavřených Austrálií, s výjimkou DVO s Čínou. Tato doložka se vyskytuje v daných smlouvách ve dvou podobách a to buď v jednoduché nebo složité verzi. Kde jednoduchá verze negarantuje investorovi žádná hmotněprávní práva a její aplikace záleží pouze na srovnání dle doložky národního zacházení či doložky nejvyšších výhod s jinými investori. Na druhou stranu, její složitá varianta, která je obsažena ve 2 BID a 5 DVO, garantuje investorovi odškodnění státem podobné jako v případě vyvlastnění.

5.2.7 Doložka Zachování Práv

Doložka zachování práv je obsažena ve všech BID s Austrálií s výjimkou 2 BID. Dále 4 DVO s Austrálií obsahují taktéž tuto doložku.

6. Závěr

Zahraniční investice jsou klíčové pro rozvoj ekonomiky každého státu. Existují různé faktory, které ovlivňují rozhodování investorů, zda investovat v určité zemi. Avšak před samotným provedením investice by se měl každý investor detailně seznámit s právní úpravou zahraničních investic v dané zemi a tak se vyhnout případným sankcím či pochybením ze strany hostitelského státu.

Spousta států se snaží přitáhnout zahraniční investory sjednáváním investičních smluv, jejichž účelem je podpora a ochrana zahraničních investic. K získání této ochrany je potřeba, aby investor i jeho investice spadali do působnosti dané investiční smlouvy. Všechny investiční smlouvy s Austrálií obsahují široký pojem investice a tak téměř každá majetková hodnota může spadat do působnosti těchto smluv. Aby taktéž investor spadl do působnosti dané smlouvy, je nutné, aby měl příslušnost daného státu. Pro společnost je takovýmto faktorem pro určení příslušnosti dle investičních smluv s Austrálií rozhodující kritérium inkorporace a dále test inkorporace s kombinací s kritériem kontroly.

Nejdůležitějším zákonem, který upravuje monitoring zahraničních investic v Austrálii je *Zákon o zahraničních akvizicích a převzetích z roku 1975*, který je prováděn Australským ministrem financí a Výborem pro monitoring zahraničních investic. Tento zákon upravuje investiční návrhy podávané zahraničními osobami a dle tohoto zákona některé tyto návrhy musí být oznámeny ministru financí před jejich realizací. V zásadě, všechny zahraniční investice jsou Australskou vládou vítány a jsou zakázány, pokud odporují národnímu zájmu. Pojem národního zájmu však není v legislativě definován, což na druhou stranu umožňuje vládě flexibilitu v rozhodování.

Hmotněprávní standardy obsažené v investičních smlouvách zaručují investorům ochranu práv ze strany hostitelského státu a jejich porušení může vést až k investčinímu sporu mezi investorem a hostitelským státem. V investičních smlouvách s Austrálií jsou obsaženy různé standardy garantující různá práva a jejich znění se liší. Ve většině případů DVO obsahují detailnější úpravu těchto standardů oproti těm v BID. Tatkéž obsah práv v některých standardech, jako například v případě mezinárodního minimálního standardu, doložky spravedlivého a rovnoprávného zacházení a standardu ochrany před svévolným a diskriminačním zacházením je neurčitý a jejich interpretace bude záviset na faktech daného případu a znění dané investiční smlouvy.

Lze uzavřít, že investiční prostředí v Austrálii je atraktivní, liberální, transparentní a představuje mále politické či právní riziko pro investory a jejich investice.

Key words/Klíčová slova

legal aspects, foreign investment, Australia.

právní aspekty, zahraniční investice, Austrálie.